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NEUTRAL RIGHTS AND OBLIGATIONS IN THE ANGLO-BOER WAR

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NEUTRAL RIGHTS AND OBLIGATIONS IN THE ANGLO-BOER WAR

BY

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BALTIMORE

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PREFACE.

This essay is the outgrowth of work done in the Political Science Seminary of the Johns Hopkins University and is a portion of a larger study dealing with the causes of the Anglo-Boer War and the questions of international law arising during that conflict.

At the beginning of the war the English Government was inclined to view the contest as one which would not make it necessary to call into operation the neutrality laws of third parties. It was soon realized, however, that the condition of insurgency was not broad enough to sustain the relations between the two Governments. Toward the close of November Great Britain's declaration with a retroactive effect put the contest upon a distinctly belligerent basis and accepted the date of the Transvaal's ultimatum, 5 P. M., October 11, 1899, as the commencement of the war.

Other Powers which had awaited this announcement with some anxiety at once declared their attitude toward the war. Among the first to assume this neutral position was the United States with the announcement that its attitude would be in accordance with the requirements of the strictest neutrality.

It is the purpose of the first chapter to inquire how far these obligations were fulfilled by the United States Government, and in the second chapter the attitude of European Governments is considered. In the third chapter the rights and obligations of belligerents and neutrals are discussed with regard to neutral commerce. Under this topic the wide divergence of English practice from Continental as well as from American opinion on points of international law cannot fail to be noticed.

The chief sources of information used in the preparation of the present paper have been the British Blue Books; the Foreign Relations of the United States; the House and Senate Documents not included in the Foreign Relations; the Congressional Record, Debates in Congress, Resolutions and Reports in answer to requests for information. Other sources and authorities are indicated in the footnotes.

I wish to express my gratitude to Dr. W. W. Willoughby, not only for his careful criticism of this study during its preparation, and for the helpful suggestions by which he has attempted to correct some of its obvious deficiencies, but especially for his kindly inspiration at all times.

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NEUTRAL RIGHTS AND OBLIGATIONS IN THE ANGLO-BOER WAR.

CHAPTER I.

The Neutrality of the United States.

The neutral attitude assumed by the United States was maintained throughout the war. With reference to any official recognition of the Transvaal as an independent State apart from the immediate purposes of war no action was taken. This view of the situation in South Africa was entirely consistent with the requirements of international law, and, in carrying out the obligations of a neutral to the belligerents, the governmental position was fully justified by a knowledge of the relations which had existed between the Transvaal and Great Britain in the past.

Early in October, before war had actually begun, it was understood that Mr. Pierce, the Orange Free State consul-general in New York, had made every effort to induce President McKinley to request other nations to act with the United States as arbitrators in the dispute between the Governments of the Transvaal and Great Britain, but the close friendship existing between England and the United States and the very friendly attitude assumed by Great Britain during the Spanish-American War made such action impossible. The State Department at Washington announced that in the event of war the Government would maintain an absolutely neutral attitude, and issued instructions early in October to all American consuls in South Africa directing them to secure protection for all neutrals of the United States who had not affiliated politically with either Great Britain or the South African Republics, either by exercising the franchise or otherwise. While those

whom this definition did not cover were not to be directly under the protection of the United States, the State Department expressed itself as ready to use its good offices in their behalf in case they were involved in trouble resulting from the war. Such had been the position of the Department in the case of Mr. John Hays Hammond, a citizen of the United States who had been involved in the Jameson Raid, although he had taken part in an expedition which was not officially approved by Great Britain and which was hostile to a Government with which the United States had no quarrel.[1]

On October 8, the day before the Transvaal ultimatum was presented to Great Britain, the British Ambassador in Washington confidentially inquired whether in the event of an attack upon the English forces by the Boers, rendering necessary the withdrawal of the British agent, the United States would allow its consul to take charge of the British interests in the Transvaal.[2] Consent was very properly given on the eleventh that the United States would gladly allow its consul at Pretoria "to afford to British interests in that quarter friendly and neutral protective offices."[3] On the thirteenth this courtesy was acknowledged and the information given that the British agent had withdrawn. On the same day Mr. McCrum was instructed, "with the assent of the South African Republic, to afford to British interests the friendly protective offices usual in such contingencies."[4]

Having thus assumed an attitude entirely in accord with the obligations incumbent upon a neutral, the United States refused to heed the popular demand to urge upon Great Britain its offices as mediator in a matter which directly concerned the British colonial policy. Secretary Hay properly refused to involve the Administration in the complications which would have followed any official interro-

[1] For. Rel., 1896, pp. 562–581.
[2] For. Rel., 1899, p. 350, Tower to Hay, Oct. 8, 1899.
[3] For. Rel., 1899, p. 350, Hill to Tower, Oct. 11, 1899.
[4] For. Rel., 1899, p. 351, Tower to Hill, and Adee to Tower, Oct. 13, 1899.

gation addressed to the British Government with reference to its ultimate intentions in South Africa. Moreover, it was authoritatively stated that any concerted European intervention would not meet with favor in Washington, as such action would only tend to disturb general commercial relations by embroiling most of the nations of the world. Any attempted intervention would certainly have led to a conflict of the Powers, and would have involved questions of national supremacy, disturbed the balance of power, and raised the Chinese question, in which last the United States had an important interest. It was a sound policy therefore upon the part of the United States not to encourage any intervention by European nations in the affairs of Great Britain in South Africa.

This attitude not only reciprocated the friendly feeling shown by England during the Spanish-American War, but was in strict accord with the traditional American policy enunciated by Washington. The acquisition of the Philippines had only served to exemplify the soundness of this doctrine, and the State Department was not in a mood to take the initial steps which might lead to added responsibilities with reference to matters which, in this instance at any rate, were not directly of American concern. The part to be played by the United States was clearly that of an impartial neutral.

In his message to Congress in 1900 President McKinley stated that he was happy to say that abundant opportunity had been afforded in the situation at Pretoria to permit the United States consul there to show the impartiality of the Government toward both the combatants. Developments, however, were to show that things had not gone so smoothly there as was supposed at the time.

On December 8 the President had appointed Mr. Adelbert Hay, son of the Secretary of State, to succeed Mr. McCrum in his position as consul and instructions were sent to him to proceed at once to Pretoria. Mr. Hollis, the American consul at Lorenzo Marques, was directed at

the same time to act *ad interim* at Pretoria after the departure of Mr. McCrum and until Mr. Hay could reach South Africa. On December 18 Mr. Hollis took charge of all British and American interests within the Transvaal while still keeping an oversight of the affairs of the United States in and around Lorenzo Marques.

Soon after the war had begun Mr. McCrum had reported to Washington, in reply to inquiries with reference to the British prisoners in the hands of the Boers, that it was the wish of the Republican Government that in the future all requests for the payment of money to officers or other prisoners, as well as inquiries regarding their welfare, should come through the regular military channels at the front. The Republic at the same time intimated that it could no longer recognize Mr. McCrum in any official capacity on behalf of Great Britain.[5] The British representative at once suggested that the United States consul be instructed to point out to the Transvaal that such an attitude was a departure from the usual practice in not permitting the American Government to use its friendly good offices on behalf of the English prisoners of war. Lord Salisbury called attention to the fact that during the Crimean War " moneys " for the British prisoners in Russia were distributed through the Danish representatives in St. Petersburg and London; and that during the Franco-Prussian War such small sums of money were handed to the French prisoners in Germany through the British Foreign Office. It was understood as a matter of course that reciprocal privileges would be extended to the Boer prisoners in the hands of the English commanders.[6]

Mr. McCrum, following instructions from his Government, had placed the English view of the situation before the Transvaal authorities before he left Pretoria, and had called their attention to the fact that for them to permit the charitable and humane intervention of the United States consul under the circumstances was the regular course in time of

[5] For. Rel., 1900, p. 619, Hay to Pauncefote, Nov. 11, 1899.
[6] *Ibid.*, p. 619, Hay to Pauncefote, Nov. 22, 1899.

war.[7] But not until Mr. Hollis reached Pretoria was the attitude of the Republic explained. He inquired of the Secretary of State as well as of the Secretary for Foreign Affairs with reference to the attitude he would be allowed to assume toward British interests; to what extent he might act on behalf of British prisoners of war in the Transvaal and Orange Free State; and how far he might exercise the usual consular functions on behalf of Great Britain during the war.

The report was made to Washington "from many official and consular sources that the late British agent at this capital [presumably Mr. Green] was always a thorn in the side of this Government, and that he is, in part, responsible for this present war."[8] It was pointed out that since this was the attitude of the Republican Government there existed at Pretoria a decided aversion to the recognition of any one who might claim to act as a British agent. The Transvaal Secretary of State expressed himself emphatically upon the point: "We got rid of the British agent on the eleventh of October last, and God willing, we will never have another one here."[9] Mr. Reitz even went so far as to express the confident hope that at the close of the war a British minister and British consuls would reside at Pretoria, but he was positive upon the question of receiving any one who was known as an agent of Great Britain. No one who assumed this relation toward the English Government would be acceptable to the Transvaal and Orange Free State.

The attitude which the Republic alleged it had been willing and was ready to assume was an unwillingness to recognize the consul of the United States or any other consular officer as the official representative of the British Government during the war; an objection to the transmission of the official communications of the English Government to that of the South African Republic, or of the official des-

[7] For. Rel., 1900, p. 620, Hay to Pauncefote, Nov. 28, 1900, and Hay to Pauncefote, Apl. 9, 1900.
[8] For. Rel., 1900, p. 621, Hollis to Hill, Feb. 2, 1900.
[9] For. Rel., 1900, p. 621, Hollis to Hill, Feb. 2, 1900.

patches of the English Government addressed to the British prisoners in the hands of the Transvaal, or of "moneys" or funds sent by the British Government to the English prisoners of war. On the other hand the Transvaal authorities were not unwilling to allow the United States consul at Pretoria to perform certain enumerated services in behalf of all British prisoners of war and their friends. No objection was made to the forwarding of letters and papers sent by friends to the prisoners, and, under the supervision of the War Office of the Transvaal, the Republic expressed itself willing to permit the distribution of funds sent to the English prisoners by their friends at home. But it was understood that such services would be reciprocal, and that the Republic would have the right to request similar services of the American consular officers on behalf of the Boer and Afrikander prisoners in the English possessions. The right was reserved to revoke any and all privileges to receive letters, papers, parcels and money, which were enjoyed by British prisoners in the Transvaal, should the fact be sufficiently proved that Boer or Afrikander prisoners in the hands of the English authorities were not receiving kind and humane treatment, or were being denied privileges similar to those enjoyed by British prisoners in the Republic. All concessions on the part of the Transvaal Government would be instantly revoked on these grounds as sufficient reason and cause for such action. The Republican Government asserted that this had been the attitude in accordance with which it had acted from the commencement of the war.[10]

With reference to the recall of the American consul and the appointment of Mr. Adelbert Hay, it appears that there had been a certain amount of friction between Mr. McCrum and the English censor at Durban concerning the consular mails. In connection with this incident, and a little unwisely it would seem, Mr. McCrum had reported unofficially that his mail had been tampered with by the censor

[10] For. Rel., 1900, pp. 621–622, Hollis to Reitz, Jan. 31, 1900, and Reitz to Hollis, Feb. 2, 1900.

and had been forwarded to him only after Colonel Stowe, the American consul-general at Cape Town, had secured its release. He asserted: "I had the humiliation, as the representative of the American Government, of sitting in my office in Pretoria and looking upon envelopes bearing the official seal of the American Government, opened and officially sealed with stickers, notifying me that the contents had been read by the censor at Durban." And he continues, "when I accepted my post as consul I knew nothing of any secret alliance between America and Great Britain."[11] These charges brought forth in the House of Representatives a resolution which called upon the President to furnish information as to whether the consul's mail had been opened and read by the British censor and, if so, what steps had been taken in the matter. Information was also asked as to what truth there was in the statement that a secret alliance existed between the "Republic of the United States and the Empire of Great Britain."[12]

In response the President reported through the Secretary of State that the Department had been in regular communication by mail and telegraph with Charles E. McCrum, late consul at Pretoria, since his entrance upon the duties of the office. Communications made to him had been answered by him. His despatches forwarded through the consulate at Lorenzo Marques had been regularly received during his incumbency in office. It was pointed out that the only instance of complaint had been in November, when a temporary stoppage of the mails had occurred at Cape Town, against which both Mr. McCrum and the consul at Lorenzo Marques had protested. But arrangements had been then made for the prompt delivery of all the consular mails to the United States consulate at Cape Town by which they were forwarded to the consul at Lorenzo Marques and thence to Pretoria. The delay had continued only a few days and the difficulty had not occurred again. It was pointed out also that this arrangement had been made

[11] H. R., Doc. 458, 56 Cong., 1 Sess.
[12] H. Res. 149, 56 Cong., 1 Sess.; also H. Res. 160.

known to both Mr. McCrum and Mr. Hollis as early as November 16, and that no obstacle had since existed to prevent the unhampered correspondence from Pretoria to Washington. Moreover, the Secretary of State asserted that Mr. McCrum had not officially reported "any instance of violation, by opening or otherwise, of his official mail by the British censor at Durban, or any person or persons whatsoever, there or elsewhere;"[13] he had not so reported since he left Pretoria, although ample opportunity was afforded him to do so by mail or in person when he reported to the Department on his return.

In regard to the second charge made by Mr. McCrum it seemed hardly necessary to say that there was no truth in the statement that a secret alliance existed between Great Britain and the United States; that no form of secret alliance was possible under the Constitution since all treaties required the advice and consent of the Senate. Mr. Hay concluded, however, by emphatically assuring the members of Congress that "no secret alliance, convention, arrangement, or understanding exists between the United States and any other nation."[14]

Mr. McCrum later appeared before the Committee on Foreign Affairs in the House of Representatives and stated his side of the case. He declared that while at Pretoria he had *understood* that the British Government was in possession of the United States cable ciphers but he was unable to affirm this from personal knowledge. He based his belief, he said, upon the fact that when on November 6 he had cabled by way of Durban to the Department asking for leave of absence the incident had been reported to have been published in a Durban paper on the following day, although he had cabled in cipher. He was not able to say, however, whether the fact of his desiring leave was actually published on November 7, as he had not seen the paper, but had heard that the fact had been published. He asserted that the first actual evidence of the

[13] H. R., Doc. 458, 56 Cong., 1 Sess.
[14] H. R., Doc. 458, 56 Cong., 1 Sess.

opening of his mail was in the case of two opened letters reaching him, but he admitted that he had not reported the matter to the Department. When Mr. Hay mentioned the matter to Sir Julian Pauncefote, the British Ambassador in Washington, the English Government replied that it had no knowledge of the incident, and gave the assurance that if it had occurred it had been contrary to instructions. Colonel Stowe later informed Mr. Hay that two letters from the consulate at Cape Town, one for Pretoria, the other for Lorenzo Marques, had been opened by the censor at Durban, but that Sir Alfred Milner, the British High Commissioner, had afterward offered a very satisfactory apology.

In view of these facts the committee of the House, before which Mr. McCrum appeared, made no report, and when Mr. Adelbert Hay reported that he had failed to find on the files of the consulate any evidence of the official mail having been tampered with, the incident was considered closed. Mr. Hay declared that as far as he could ascertain, no interference had occurred in the communication, either telegraphic or postal, between the State Department and the consulate.[15]

The new consul at Pretoria also reported that everything was as satisfactory as could be expected under the circumstances of war, and his official intercourse with the Transvaal Government afterwards fully justified this assertion. The republics displayed a proper attitude toward the consulate not only as representing American interests, but as representing Great Britain during the course of hostilities. Every facility was afforded the American consul for performing his duties. For the efficient service he had rendered in connection with the British prisoners he was publicly thanked by the British High Commissioner, who expressed the feeling of gratitude which he said existed throughout the British Empire for the good work which had been performed by both Mr. Hay and Colonel Stowe, the latter at Cape Town.

[15] For. Rel., 1906, p. 20, Hay to Pauncefote, Apr. 9, 1900.

While enforcing the obligations of a neutral State by an attitude of strict impartiality toward both belligerents, the United States was not inclined to allow popular sympathy for the Boers to lead to complications with foreign nations over a matter with which it was only remotely concerned. This position was known to the envoys of the Transvaal and Orange Free State before they left Pretoria. Ample opportunity to realize the situation had been afforded them before they left Europe for America after an unsuccessful tour of the capitals of the Continent. Nevertheless, they determined to appeal to the United States, and with this purpose in view arrived in Washington on May 17, 1900. A resolution introduced in the Senate by Mr. Allen of Nebraska on May 19, which would have extended the privilege of the floor to them, was laid on the table,[16] a decision the wisdom of which is unquestionable. The Senate stands before the world as an important part of the treaty-making power of the United States. Such a privilege, if extended to the mission, could have meant nothing to foreign powers but an official reception to the envoys of a government which was not recognized as legitimate by its former conventional suzerain. It was not the part of the Senate to inquire into the substance of the past relations between Great Britain and the Transvaal. Especially was this true since the governmental position had been declared early in the war and nothing had occurred to warrant any alteration in that position. This was the view which President McKinley took of the situation, and the policy of dealing with the problem was that of the strictest neutrality.

On May 21 it was officially announced that the delegates had called by appointment at the State Department. The notice given out to the press read: "They were cordially received and remained with the Secretary of State for more than an hour. They laid before the secretary at much length and with great energy and eloquence the merits of the controversy in South Africa and the desire of the Boer Re-

[16] 56 Cong., 1 Sess., Record, pp. 5735, 5783–86.

publics that the United States should intervene in the interests of peace and use its influence to that end with the British Government."[17] The ambition of the envoys on leaving the Transvaal for Europe had been "for the purpose of seeking recognition and intervention," but the success of their mission at Washington was not to be greater than it had been in European capitals. Although Mr. Hay received them courteously their competence to treat directly with the State Department was not recognized. When they realized this fact they appealed directly to the people in the hope of bringing a certain amount of pressure to bear upon the President from that source. He fully realized, however, that under the circumstances no interference was advisable. A departure from this policy would have created a precedent which might later have been appealed to by any European government in behalf of its subjects in this country. As Presidential candidate, however, William J. Bryan, in effect, if not in express terms, promised a mediation that would mean something should the Democrats come into power, and it was hopes created by such utterances which encouraged the Boers to believe that intervention on the part of the United States was a possibility. Even the Senate passed resolutions of sympathy which only held out a vain hope and naturally caused a certain amount of criticism in England. In the end, however, the envoys became convinced that nothing was to be hoped for in the way of dictatorial interference by the United States.

In his message to Congress, in 1899, three months after the war began, President McKinley had been able to declare: "This Government has maintained an attitude of neutrality in the unfortunate contest between Great Britain and the Boer States of Africa. We have remained faithful to the precept of avoiding entangling alliances as to affairs not of our direct concern. Had circumstances suggested that the parties to the quarrel would have welcomed any kindly expression of the hope of the American people that war

[17] Moore, Digest of Int. Law, Vol. I, p. 213.

might be averted, good offices would have been gladly tendered." And in May, 1900, after the interview with the Transvaal delegation, Mr. Hay gave out a statement through his secretary in which it was declared that this entirely correct neutral attitude had been strictly adhered to: "As the war went on the President, while regretting the suffering and the sacrifices endured by both of the combatants, could do nothing but preserve a strict neutrality between them. This has been steadfastly and constantly done, but there never has been a moment when he would have neglected any favorable occasion to use his good offices in the interest of peace."[18] Mr. Hay also pointed to the fact that on March 10, 1900, at the request of the Republics, the United States consul at Pretoria had communicated with his Government with a view to the cessation of hostilities, and that the same proposal was made to European powers through their respective consuls.

The request of the Transvaal was at once despatched to London, and the earnest hope was expressed by the President that a way might be found to bring about peace, with the intimation that he "would be glad to aid in any friendly manner to promote so happy a result." The Transvaal was promptly informed of this action and the United States representative in London communicated the President's instructions to Lord Salisbury. In answer he was requested to "thank the President for the friendly interest shown by him," but it was unmistakably declared that "Her Majesty's Government could not accept the intervention of any power."[19] This reply was communicated to Pretoria, and no further steps were taken, since any insistence upon the part of the United States would have been an unfriendly act.

In justification of the action of the President, in view of the popular feeling that more urgent pressure might have been used to cause the cessation of hostilities, Secretary Hay clearly showed that the United States Government was the

[18] Moore, Digest of Int. Law, Vol. VII, p. 19.
[19] Moore, Digest of Int. Law, Vol. VII, p. 20.

only one of all those approached by the republics which had even tendered its good offices in the interest of peace. He called attention to the fact that despite the popular clamor to the contrary the action of the Government was fully in accord with the provisions of the Hague Conference and went as far as that Convention warranted. A portion of Article III of that instrument declares: "Powers, strangers to the dispute, may have the right to offer good offices or mediation, even during the course of hostilities," but Article V asserts, "The functions of the mediator are at an end when once it is declared either by one of the parties to the dispute or by the mediator, himself, that the means of conciliation proposed by him are not accepted."[20] Obviously any further action on the part of the United States was not required under the circumstances, and Secretary Hay seems fully justified in his statement that "the steps taken by the President in his earnest desire to see an end to the strife which caused so much suffering may already be said to have gone to the extreme limit permitted to him." Moreover, had the President preferred not to present to Great Britain the Republic's request for good offices, his action could have been justified by the conditions under which the representatives of the United States at the Hague signed that convention. At that time the express declaration was made that "Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself with questions of policy or internal administration of any foreign State."[21]

The final utterance of the President in regard to the mission of the Boers was the conclusive statement made through Secretary Hay: "The President sympathizes heartily in the desire of all the people of the United States that the war . . . may, for the sake of both parties engaged, come to a speedy close; but having done his full duty in preserving a

[20] Moore, Digest of Int. Law, Vol. VII, p. 23.
[21] Moore, Digest of Int. Law, Vol. VII, p. 21.

strictly neutral position between them and in seizing the first opportunity that presented itself for tendering his good offices in the interests of peace, he feels that in the present circumstances no course is open to him except to persist in the policy of impartial neutrality. To deviate from this would be contrary to all our traditions and all our national interests, and would lead to consequences which neither the President nor the people of the United States could regard with favor."[22]

The attitude of the United States in the immediate vicinity of the war as well as the manner in which the envoys of the Transvaal were received in Washington rendered criticism impossible with reference to the fulfilment of the obligations of a neutral State. But serious charges were repeatedly made by the Transvaal sympathizers with reference to the use to which American ports and waters were put by British vessels or British-leased transports plying between the United States and South Africa. It was alleged that Great Britain was able to create here a base of warlike supplies, and thus to obtain material aid in her operations against the Boer forces. The probability of the truth of the Transvaal's allegations would seem at first thought to be slight considering the distance of the scene of war from the coasts of the United States, but upon closer inspection these charges become more worthy of belief. That warlike supplies were actually transported from at least one of the ports of the United States under such a systematic scheme as to constitute a base of hostile supplies for the English forces in South Africa, would seem to be established.

Individual commercial transactions with belligerents always occur, and it is not the part of neutral governments to assume responsibility for all such transactions, but the principles of the international law of the present day do require all neutral states to see to it that their respective territories are not made bases for hostile operations.

[22] Moore, Digest of Int. Law, Vol. VII, p. 21.

A few minor incidents showed that the obligations of neutrality would be enforced by the United States when it became apparent to the Government that the neutrality laws were being evaded. In Cincinnati a Frenchman giving his name as Pierrot was summoned before the United States Attorney on a charge of a violation of neutral restrictions. He had been known, it seems, as a recruiting officer for the Transvaal Government, but avowed that he had engaged men only for the Boer hospital corps and not for the army of the Republics. The warning that he must cease enlisting men even for this branch of the republican service proved sufficient in this case, but undoubtedly such recruiting on a small scale continued to evade detection.

Later, the New York courts restrained the steamer *Bermuda* from leaving the port upon the application of a British subject, who alleged that he had been informed that the *Bermuda* was carrying contraband to the Transvaal. After a detention of five days the ship was allowed to sail because it was not shown that the allegation had any foundation in fact.

Toward the close of November, 1900, a charge of a more serious nature was made. It was reported that a British remount establishment was operating in the United States and had just purchased fifty thousand horses and mules for the British forces in South Africa, and considerable attention to this alleged violation of neutral obligations was drawn by that portion of the press which was in sympathy with the Boers. A resolution was adopted by the House of Representatives calling upon the President to furnish information "whether our ports or waters had been used for the exportation of horses, mules, and other supplies for use in South Africa, and if so, to what extent and what steps had been taken to prevent such a use being made of neutral territory in time of war."[23] The request was also made that full information be furnished with reference to the number of horses and mules which had been

[23] H. Res. 414, 418, 56 Cong., 2 Sess., Feb. 28, 1901.

cleared from the ports of the United States since the beginning of the war, with a detailed statement of the shipments from each port and the dates of such clearances.

The reply submitted to Congress was that the ports of the United States had been used for the exportation of horses and mules and other supplies for use in South Africa; that between October, 1899, and January 31, 1901, the value of such shipments had amounted to $26,592,692; that no steps had been taken to prevent the "lawful exportation of horses, mules, and other supplies to South Africa;" and that the number of horses and mules shipped from the ports of the United States during this period had been 76,632. It was not practicable, it was asserted, to give the shipments from each port and the dates of such shipments without examining the copies of the manifests of each vessel that had cleared for South Africa. Such an examination and compilation could not be presented to Congress before its adjournment, although copies of the clearance papers were filed with the collectors of the customs at the different ports of the country.[24]

In the same report it was shown that of the entire exports to South Africa during this period a large proportion had been of warlike supplies, if horses and mules for army purposes can be considered warlike in character; 28,598 horses valued at $2,698,827; 48,034 mules valued at $4,611,365. Gunpowder to the value of $1472 had also been exported; other explosives to the value of $7073, and firearms valued at $924, in all $7,310,661 worth of such supplies exported to one or both of the belligerents in South Africa. Possibly the larger proportion of the gunpowder, other explosives, and firearms was run into the Transvaal by way of Delagoa Bay as contraband under the usual risks, or was used for purposes apart from the war, but with reference to the supplies for the British army it would seem that a very free use was made of the ports and waters of the United States. One reason why the English Government

[24] H. R., Doc. 498, 56 Cong., 2 Sess.

was able to supply its armies in South Africa with horses and mules in such large numbers may have been the fact that a better market supply existed in this country, but it is more probable that the evasion of the strictest neutral requirements was easier here than elsewhere. The distance from the scene of war, although it involved an additional cost for transportation, also rendered an evasion of the requirements of neutrality less conspicuous. The supply of horses and mules in the European market was scant, especially in the class of animals which was needed, but it seems obvious that the motive which actuated the purchases was rather the greater ease in evading neutral prohibitions than the desire to secure a better market at a distance of ten thousand miles from the seat of war. Possibly both motives actuated the purchases, but it is nevertheless true that the United States ports were used to a far greater extent than those of any other neutral Government. The last statement is borne out by the Report of the Royal Commission on the War in South Africa, which shows that from November, 1899, to June, 1902, inclusive, no fewer than 191,363 horses and mules were shipped from the ports of the United States for the British forces in South Africa, aggregating a total cost to Great Britain of approximately $20,175,775. The entire cost in the United States and elsewhere for such purchases at the end of July, 1902, amounted to $52,000,000 in round numbers. The entire cost incurred within the United States was greater than that incurred in any other country. In Hungary the cost to Great Britain for horses and mules was $8,203,505; in Spain $1,667,695; in Italy $688,690; in the Argentine Republic, the British colonies and elsewhere, $21,284,335.[25]

In view of this undoubted use of the ports and waters of the United States by one of the belligerents in a war toward which a neutral attitude had been declared, it may be inquired how far the condition of affairs was known to the Administration and what opportunity there was for execu-

[25] Sessional Papers of the House of Commons, C. 1792 (1903), p. 260.

tive action, especially with reference to the allegation made by the Transvaal that the port of New Orleans was used as a base of warlike supplies for the British forces.

On April 10, 1902, a resolution of the House of Representatives called upon the President for copies of "any report and communication of the Governor of Louisiana, together with all accompanying affidavits, documents and communications concerning the shipments of horses, mules, and other supplies from Louisiana to the seat of war in South Africa."[26] In response a report of Secretary Hay disclosed the fact that on February 1, 1902, a certain Samuel Pearson had appealed to the President against the use to which Great Britain had been allowed to put the ports of the United States in supplying her armies in South Africa. Pearson had affirmed that "the port of New Orleans was being made the basis of military operations and the port and waters for the purpose of the renewal and augmentation of military supplies for the British army." He further alleged that the attention of the courts had been called to the matter and the United States circuit court for the eastern district of Louisiana had declared that the case was not within the cognizance of the court since the matter could be taken up only by the executive branch of the government.[27] In making his plea directly to the President, Pearson asserted that at the port of Chalmette, a few miles below New Orleans, a British post had been established; that men and soldiers had been assembled there and were daily engaged in warlike operations not only for the renewal and augmentation of military supplies, but for the recruitment of men. He alleged that no concealment was made of the facts as he had stated them; that although the English officers did not appear in uniform war was actually being carried on in behalf of the British Government from the territory of the United States. He concluded: "With every respect for the authority of the United States Government, may I not consider your silence or inaction the

[26] H. R., Doc. 568, 57 Cong., 1 Sess., p. 1.
[27] Pearson *v.* Parson, 108 Fed. Rep. 461.

equivalent of consent for me to stop the further violation of the neutrality laws of this port, or to carry on war here for the burghers."[28]

The President referred the matter to the Mayor of New Orleans with the intimation that a breach of the peace was threatened. The Mayor shifted the responsibility to the Governor of the State on the ground that the acts complained of were alleged to have been committed in the parish of St. Bernard and consequently outside the jurisdiction of the city authorities. Finally, under the orders of the Governor the Sheriff of St. Bernard parish made an investigation and reported that Pearson's statements had been incorrect in a number of points.[29] It was admitted that mules and horses had been and were then being loaded at Port Chalmette for the British Government either directly or indirectly; that the operation was being carried out by local men all of whom were citizens of the United States; that the work was being supervised by Englishmen who might or might not be officers of the British army, although none of them wore the uniform of Great Britain. But the Sheriff positively asserted that a British post with men and soldiers was not established at the port; that no recruiting of men was taking place within the parish; that the only men taken on the ships were muleteers who were employed in the city of New Orleans by the contractors; that these men were taken on board the ships when in mid-stream by tugs which set out from the city wharves.

In a personal interview "General" Pearson made the same charges to the Governor that he had made in his letter to the President. He asked that he be allowed to offer forcible resistance to the shipments to South Africa, and to the enlisting or employing of men as muleteers, who, he alleged, were later incorporated in the British army. This interview took place the day following the Sheriff's letter partially denying the charges to the Governor, and the latter

[28] H. R., Doc. 568, 57 Cong., 1 Sess., p. 3.
[29] H. R., Doc. 568, 57 Cong., 1 Sess., p. 4; Nunez, Sheriff of St. Bernard, to Heard, Governor of Louisiana, Feb. 28, 1902.

was not disposed to take any action in the matter until proof of the accuracy of the averments was produced, although the facts which were alleged had become widely known.

The attitude of the Administration with reference to Pearson's letter, it was believed by the press, was not of a character to inspire great confidence in the strict performance of neutral duties. To ignore an allegation of so flagrant a character as the breach of neutrality, it was declared, constituted a disregard of American ideals in the interest of British imperialism which could not be excused by jocular references to "General" Pearson's request to the President "to either put an end to this state of affairs or permit me to strike one blow."[30]

It was pointed out that the problem raised by Pearson was not one that might be laughed out of the White House, but was the serious question whether the British Government should any longer be permitted, in violation of American neutrality, to use an American city and port as a base of warlike operations against a friendly people. The newspapers, too, had made public the movements of the English army officers in charge of the shipments. It seems that the base of operations at first used by Great Britain was Southport, but that Chalmette had later been selected. The efficiency of the latter station was reported upon in March, 1902, by General Sir Richard Campbell Stewart of the British army. Everything pertaining to the efficiency of the transportation service was carefully inspected on behalf of the British Government. Colonel DeBergh, who was in command of the remount service in the United States, declared that he had not received orders from the British War Office to discontinue the shipments, and that they would be continued "unless General Pearson and the Boer army drive our garrison away."[31]

The evidence which Pearson was able to place before Governor Heard and which the latter laid before the President seemed to substantiate the fact that at least one of the ports

[30] The Republic of Chicago, Feb. 15, 1902.
[31] The New Orleans Picayune, Mar. 28, 1902.

of the United States had been constantly used and was then being used as a base of military transportation to the British forces in South Africa. It was shown that William B. Leonard, of New Orleans, had contracted with Major H. J. Scobell, representing the British Government, for the purchase of mules to be shipped to South Africa for military purposes. The contract had been signed in October, 1899, and during the months from October, 1899, to May, 1900, large numbers had been shipped to South Africa under the immediate direction of British army officers.[32] P. B. Lynch made affidavit that he had been employed as clerk and bookkeeper in the bureau of the British remount service in New Orleans from December, 1899, to September, 1901. He explained the operations of the remount service as well as its methods, and indicated clearly the direct connection of regularly appointed officers of the British army with the purchase and shipment of horses and mules to South Africa. The purchases, it seems, were made at different points in the country and afterward assembled at a place designated by the officer in charge in New Orleans. The British army brand was then placed upon the animals, which were immediately consigned to the British officer in New Orleans but without giving his military title. They were then transferred to ships the charter parties of which were agents of the English Government. It was shown that the ships' agents usually employed muleteers taken on by tugs from the city of New Orleans, and it was proved that the whole operation was controlled by English army officers who were detailed from London or from South Africa for the purpose.[33]

The testimony of Charles J. Cole showed that as foreman in charge of seventy or more men he had made six trips to South Africa in the service of the British Government or of its agents. His testimony was substantiated by certificates for seamen discharged before the superintendent of

[32] Leonard *v.* Sparks Bros. & McGee, Civil District Court, Parish of New Orleans, Division E, No. 62,770, Feb. 24, 1902.

[33] H. R., Doc. 568, 57 Cong., 1 Sess., p. 9; also pp. 10–13 passim.

a mercantile marine office in the British Empire, a British consul, or a shipping officer on board the vessel on which he had sailed. He had been employed on the transports *Prah, Montcalm, Knight Bachelor, Montezuma,* and *Rosetta,* all engaged in transporting horses and mules to the British army in South Africa. He testified that the transports were in charge of regular officers of the English army and that from them all orders were received. He also avowed that many of the men were urged and solicited by the officers to join the British army, and were unable to obtain their pay unless they complied with the request.[34]

The affidavit of R. J. Tourres showed that he had served on the ship *Milwaukee.* He averred that the ship's articles were signed by him before the vice-consul of the British Government; that he was finally referred to an officer of the English army for duty and acted under his orders during the voyage from New Orleans to Cape Town; that when the vessel was not allowed to land its cargo at that place on account of the plague the consignment of horses and mules for the British army was delivered at Durban to English officers in uniform; that he was not allowed to go ashore except upon the condition of signing with the recruiting officer and joining the British army; that during the entire voyage a British military officer in uniform controlled the ship's crew; and that among the men the *Milwaukee* was known as a transport under the direct command of regularly detailed officers of the English army.[35]

The testimony of a number of other witnesses sworn before the commissioner for the eastern district of Louisiana showed that the wages of the men employed upon the ship *Montcalm* had been refused by the captain unless they would agree to enlist in the British army, but as American citizens they had refused to enlist and had demanded the wages due them under the ship's articles. August Nozeret,

[34] Pearson et al. *v.* Parson et al., United States Circuit Court, Eastern District of Louisiana; also H. R., Doc. 568, 57 Cong., 1 Sess., p. 20.

[35] Sworn to before notary public Mch. 21, 1902. H. R., Doc. 568, 57 Cong., 1 Sess., p. 21.

an American citizen, foreman of a corps of muleteers on board the *Montcalm,* testified that he was told by the ship's officers that the only way to secure his discharge at Port Elizabeth was to have a recruiting officer vouch for his enlisting in the British army; and that he complied with this demand and escaped enlistment only by pretending to be physically unable to count the number of perforations in a card when required to do so as a test of sight at the recruiting office. The affiant was able to say from his own personal knowledge that certified discharges were not given unless the men were willing to enlist in the English army.[36] An abundance of other evidence to the same effect was produced, and it was shown that both the *Montcalm* and the *Milwaukee* were under the direct control of the British war authorities. Both had their official numbers painted from their hulls before entering the Portuguese harbor of Beira.

The evidence which was thus placed before the President would seem to show that the spirit at any rate of the neutrality laws of the United States[37] had been violated, and that this violation had been systematically carried out by the British Government and not by individual citizens merely as a commercial venture.

The first section of the neutrality laws which were passed by Congress in 1818 defines the offense of accepting a foreign commission and lays down the penalty for such an offense. The second section forbids any person within the territory of the United States to enlist in a foreign service "as soldier, or as a mariner, or seaman, on board of any vessel of war, letter of marque, or privateer." The three following sections prohibit the arming of a vessel to cruise against a people at peace with the United States, or against the citizens of the United States, or the augmentation of the force of any foreign vessel of war. The next prohibits military expeditions of any kind. This section reads:

[36] Cramer et al. *v.* S. S. *Montcalm,* United States District Court, Eastern District of Louisiana, in Admiralty, No. 13,639; also H. R., Doc. 568, 57 Cong., 1 Sess., pp. 22–23.

[37] Revised Statutes, Title LXVII, Sections 5281–5291, inclusive.

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince, state, colony, district or people, with whom the United States are at peace, shall be deemed guilty of a misdemeanor, and shall be fined not exceeding $3,000, and imprisoned not more than three years."[38]

Section 5287 provides for the enforcement of the foregoing provisions. It leaves the cognizance of all complaints in the hands of the several district courts, but empowers the President to employ the land and naval forces to enforce all of the restrictions embodied in the neutrality provisions. The following section empowers the President to compel foreign vessels "to depart the United States in all cases in which, by the laws of nations, or by the treaties of the United States they ought not to remain within the United States." Section 5289 requires that a foreign armed vessel shall give bond on clearance. Section 5290 empowers the collectors of the customs to detain foreign vessels: "The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men on board, or circumstances render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens or property of any colony, district or people with whom the United States are at peace, until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section." Section 5291 defines the construction to be put upon the neutrality laws. They are not to be construed to extend to any subject or citizen of any foreign State who is only transiently within the United States, nor directly to be con-

[38] Sec. 5286.

strued in such a way as to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States. Possibly the alleged unneutral acts in the territorial waters of the United States did not fall within the strict letter of the restrictions contained in these laws. But if the provisions of 1818 are construed so as to require the maintenance of a perfect neutrality it would seem that they were evaded in the transactions which were permitted at the port of New Orleans.

In this connection the neutrality clause of the Treaty of Washington is of interest. This treaty was signed in 1871 by Great Britain and the United States and is illustrative of the requirements of neutrality as understood by these two nations should either be at war with a third party. For the immediate purposes of war the allied republics of South Africa by the fact of their recognized belligerent status possessed rights equal in international law to those held by Spain or by the United States with reference to third powers during the Spanish-American War. On April 26, 1898, the day after this war was declared, the British declaration of neutrality referred to the Treaty of Washington as embodying the terms upon which a neutral attitude should be observed: "A neutral government is bound . . . not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies of arms, or the recruitment of men, . . . to exercise due diligence in its own ports and waters, and as to all persons within its own jurisdiction, to prevent any violation of the foregoing obligations and duties." [39]

Illegal enlistment was clearly defined as understood by Great Britain: "If any person . . . being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any

[39] Art. VI; London Gazette Extraordinary, April 26, 1898; For. Rel., 1899, pp. 865–866.

foreign state at peace with Her Majesty, . . . or whether a British subject or not, within Her Majesty's dominions, induces any other person to accept any commission or engagement in the military or naval service of any . . . foreign state . . . he shall be guilty of an offense" against this act. And, "If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state . . . he shall be guilty of an offense against this act." [40]

The last clause of Article six of the Treaty of 1871 read: "And the High Contracting Parties agree to observe these rules as between themselves in future and to bring them to the knowledge of other maritime Powers and to induce them to accede to them." [41]

These provisions were strictly enforced during the Spanish-American War, and other countries in their declarations defined the neutral attitude which they assumed.

The Brazilian Government in its proclamation of April 29, 1898, declared: "The exportation of material of war from the ports of Brazil to those of either of the belligerent powers, under the Brazilian flag, or that of any other nation, is absolutely prohibited." [42] It was also pointed out that: "Individuals residing in Brazil, citizens or foreigners, must abstain from all participation and aid in favor of either of the belligerents, and may not do any act which might be considered as hostile to either one of the two parties and, there-

[40] British declaration of neutrality, Apl. 26, 1898. It was pointed out that this act extended to all Her Majesty's dominions, including the adjacent territorial waters.

[41] Cushing, Treaty of Washington (1873), p. 260. Great Britain was averse to the acceptance of this article of the treaty, but finally acceded to it in the above terms by signing the mutual agreement.

[42] Art. IV of the Brazilian proclamation of neutrality; For. Rel., 1898, pp. 847 ff.

fore, contrary to the obligations of neutrality."[43] Neither belligerent was to be permitted "to promote enlistment in Brazil, not only of its own citizens, but also of the citizens of other countries, for the purpose of incorporating them in its forces of land and sea."[44] Not even merchant vessels were to be permitted to weigh anchor in Brazilian ports until permission from the port authorities had been granted, and any movements of the belligerents were to be under the supervision of the customs authorities for the purpose of verifying the proper character of the things put on board.[45]

The decree of Denmark forbade Danish subjects to commit certain enumerated offenses, and among them: "On or from Danish territory to assist any of the belligerent powers in the enterprises of war, such as supplying their ships with articles that must be considered contraband of war."[46] Danish subjects were forbidden "to take service in any quality soever in the army of the belligerent powers or on board their government ships, such prohibition to include piloting their ships of war or transports outside the reach of Danish pilotage, or, except in case of danger of the sea, assisting them in sailing the ship;"[47] "To build or remodel, sell or otherwise convey, directly or indirectly, for or to any of the belligerent powers, ships known or supposed to be intended for any purposes of war, or to coöperate in any manner on or from Danish territory in the arming or fitting out of such ships for enterprises of war;"[48] "To transport contraband of war for any of the belligerent powers, or hire or charter to them ships known or supposed to be intended for such use."[49]

Japan forbade "the selling, purchasing, chartering, arming, or equipping ships with the object of supplying them

[43] For. Rel., 1898, pp. 847 ff., Art. I.
[44] *Ibid.*, Art. II.
[45] *Ibid.*, Arts. XVII and III.
[46] Section I (3) of Danish proclamation of neutrality, Apl. 29, 1898; For. Rel., 1898, p. 855.
[47] *Ibid.*, Sec. I (1).
[48] *Ibid.*, Sec. I (2).
[49] *Ibid.*, Sec. I (4).

to one or the other of the belligerent powers for use in war or privateering; the assisting such, chartering, arming or equipping."[50]

The Netherlands proclamation warned all Dutch subjects under penalty against exporting "arms, ammunition, or other war materials to the parties at war [to include] everything that is adaptable for immediate use in war."[51]

Although the primary object of these prohibitions was the stoppage of all dealings in articles of a contraband nature, when fairly construed in the light of international opinion they would seem to render illegal the wholesale dealing in horses and mules intended for army purposes by one of the belligerents. Such animals are undoubtedly "adaptable for immediate use in war" and were in fact a necessity for the successful carrying on of the war. In the light of the express restrictions of the Treaty of Washington as exemplified in the war between one of the parties to that treaty and a third party in 1898, the obligation imposed upon the United States, impliedly at any rate, by the sixth article of the mutual agreement of 1871 might be read: "The United States is bound not to permit Great Britain to make use of its ports or waters as the base of naval operations against the South African Republics, or for the purpose of the renewal or augmentation of military supplies."

It would seem obvious that horses and mules when intended for immediate use in military operations are within the meaning of the term "military supplies." In numbers of instances horses have been considered contraband of war. The treaty of 1778 between the United States and France declared: "Horses with their furnishings are contraband of war."[52] In the treaty of December 1, 1774, between Holland and Great Britain it was understood that "Horses and other warlike instruments are contraband of

[50] Art. 4 of Japanese proclamation of neutrality, May 2, 1898. For. Rel., 1898, p. 879.

[51] Art. II (b) of Netherlands proclamation of neutrality, May 3, 1898. For. Rel., 1898, p. 888.

[52] Article XXIV; Wharton, Digest of Int. Law (1886), Vol. III, § 372.

war." And Hall declares that horses are generally considered contraband and are so mentioned in the treaties between different States. He points out that the placing of an army on a war footing often exhausts the whole horse reserve of a country and subsequent losses must be supplied from abroad; the necessity for this is in proportion to the magnitude of the armies. Every imported horse is probably bought on account of the Government, and if it is not some other horse is at least set free for belligerent use. "Under the mere light of common sense," he says, "the possibility of looking upon horses as contraband seems hardly open to argument."[53]

Oppenheim shows that the importance of horses and beasts of burden for cavalry, artillery, and military transport sufficiently explains their being declared contraband by belligerents. He asserts that no argument against their being held as conditional contraband has any validity, and it is admitted that they are frequently declared absolute contraband.[54] During the Russo-Japanese War Russia at first refused to recognize any distinction between conditional and absolute contraband, but later altered her decision with the exception of "horses and beasts of burden," which she treated as absolute contraband.

The tendency in modern times, however, is to treat horses as only conditional contraband. The only reason that they were not expressly declared contraband in the Anglo-Boer contest was the character of the war. Had the Transvaal been able to issue an authoritative declaration and insure respect for it by a command of the sea, horses and mules would have been considered technical contraband as in fact they were actual contraband, being nothing if they were not "warlike instruments."

The enforcement of the obligations incumbent upon the United States under the circumstances undoubtedly lay with the Federal Government rather than with the States. Early in 1901 a proceeding in equity had been instituted in a

[53] International Law (1880), pp. 579–580.
[54] International Law, Vol. II, p. 426.

federal court in New Orleans for the purpose of enjoining the shipment of horses and mules from that port to Cape Colony. The bill was filed by private individuals who alleged that they had property in the Transvaal and Orange Free State which was being destroyed by the armies of Great Britain, and that these armies were able to continue their work of destruction only by means of the supplies of horses and mules which were shipped from the port of New Orleans. The application for an injunction was denied on the ground that the enforcement of the treaty obligations of the Government is a function of the President with which the courts have nothing to do.

The district judge in delivering the opinion declared that there was nothing in the principles of international law or in the terms of the Treaty of Washington, to which an appeal had been made, to prevent the citizens of a neutral state from selling supplies of war to a belligerent. The court went on to discuss the right of private citizens to sell supplies to belligerents, but did not enter upon the question whether or not the United States had permitted the British Government to make use of its ports and waters as a base for the purpose of the augmentation of its military supplies. The entire discussion of questions of international law was considered by the court as beyond its cognizance. The court said: "If the complainants could be heard to assert here rights personal to themselves in the treaty just mentioned, and if the mules and horses involved in the case are munitions of war, all of which is disputed by the defendants, it would become necessary to determine, whether the treaty is meant to prevent private citizens from selling supplies to the belligerents." The court then proceeded: "But the nature of this cause is such that none of the considerations hereinbefore set out need be decided," because "the case is a political one of which a court of equity can take no cognizance, and which in the very nature of governmental things must belong to the executive branch of the Government."[55]

[55] Pearson *v.* Parson, 108 Fed. Rep. 461.

It will be seen that the court did not pass upon the question of an improper use of the ports of the United States. Clearly an injunction could not be granted since such a measure would not have had the effect of remedying the evil. It could not issue, for it was not established that there were private property rights to be protected. The complainants could show no property in the implications of the treaty, nor could they establish the fact alleged, namely, that horses and mules are munitions of war. The last question was one for the Federal Government alone to pass upon under the circumstances. Political obligations are not proper matters for enforcement by the courts. But the court did declare emphatically that the enforcement of all neutral obligations with reference to the ports and waters of the United States was the function of the executive branch of the Government.

The question at once arose whether it was a function of the state or of the federal executive to see that the neutrality laws were properly enforced. In submitting the evidence of the operations of the British agents within the State of Louisiana Governor Heard declared it to be his opinion that it was the proper function of the federal and not of the state Government to enforce obedience to these laws; but, he concluded, "if such duty belongs to the State where the violations of such laws occur, I would not hesitate to act as the laws may warrant and in keeping with the dignity and responsibilities of statehood."[56] The Governor asked that he be informed immediately what, in the opinion of the federal authorities, were the powers and duties of the state governments in matters of this character.

Unquestionably it lay with the federal executive to see to it that the neutral obligations of all the States were properly observed. Certain duties rest upon the governors of the different States, but it is the function of the President to carry into effect the laws regulating neutral obligations as well as the provisions of all treaties with foreign powers

[56] H. R., Doc. 568, 57 Cong., 1 Sess., p. 5.

as a part of the law of the land. This duty was pointed out by Secretary Randolph in a circular of April 16, 1795, to the governors of the different States during the war between France and England. He defined the duties of neutrality and concluded: "As often as a fleet, squadron or ship, of any belligerent nation shall clearly and unequivocally use the rivers, or other waters . . . as a station in order to carry on hostile expeditions from thence, you will cause to be notified to the commander thereof that the President deems such conduct to be contrary to the rights of our neutrality. . . . A standing order to this effect may probably be advantageously placed in the hands of some confidential officer of the militia, and I must entreat you to instruct him to write by mail to this Department, immediately upon the happening of any case of the kind."[57]

It was the duty of the central Government to prevent as far as possible any abuse of the privileges which the laws of war allowed to the belligerents. "A Government is justly held responsible for the acts of its citizens," said Justice McLean of the United States Supreme Court, speaking of the Canadian insurrection of 1838. And he continued: "If this Government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable and declare war against it."[58]

Clearly the responsibility for the proper restraint rested upon the President with reference to the incidents which occurred around New Orleans. The fact that forbidden acts committed within the jurisdiction of a State of the Union escape punishment within that State does not relieve the central government of responsibility to foreign governments for such acts. In view of this fact the citizens of the separate States should remember the consequences which may result from their acts. The warning of Justice McLean, speaking of the incident already cited, is to the point:

[57] Moore, Digest of Int. Law, Vol. VII, p. 934–935.
[58] Citing Reg. *v.* Recorder of Wolverhampton, 18 Law T. 395–398; see also H. R., Doc. 568, 57 Cong., 1 Sess., p. 17.

"Every citizen is . . . bound by the regard he has for his country, by the reverence he has for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power." And he concludes: "History affords no example of a nation or people that uniformly took part in the internal commotions of other Governments which did not bring down ruin upon themselves. These pregnant examples should guard us against a similar policy, which must lead to a similar result."

In the end nothing came of the alleged unneutral conduct of the United States in the use which had been permitted of the port of New Orleans during the war. Had the South African Republic gained an international status claims for indemnity would probably have lain against the United States for a violation of its neutral duties. Had the Transvaal, recognized in war as a belligerent, become an independent State as the result of that war, such claims would doubtless have been honored and compensation been made upon equitable grounds. Had the opponent of Great Britain in the war been one of the recognized powers of the world such a use of territorial waters could not have been permitted without an effective protest having been made by the State which was injured. The Republics, however, were treated at the close of the war as conquered territory and their obligations taken over by the British Government. Their rights as an independent State vanished when they failed to attain the end for which they fought.

The extreme generosity afterward displayed by Great Britain in the settlement of the claims of all citizens of the United States who had suffered by the war may possibly be explained by the benefits which the English forces were able to secure from the construction which was put upon American neutrality.

A resolution of the House of Representatives inquiring as to the treatment of citizens of the United States in the

South African Republic brought out the fact that the number of those who claimed compensation was not large and that the British Government was willing to indemnify them.[59] The terms of settlement allowed to the United States were in marked contrast to those granted to other powers whose citizens or subjects had also presented claims for indemnity through their respective governments. This fact is evident from the transactions before the Deportation Claims Commission, the appointment of which was announced on April 8, 1901.

The commission came together "for the purpose of investigating the claims to compensation which have been made or may be made by persons the subjects of various friendly powers in consequence of their deportation to Europe by the British military authorities in South Africa."[60] It was to be composed of five members, among them "R. K. Loveday, Esq., formerly a member of the late South African Republic." The commission was to meet in London to hear such cases as might be presented there and then proceed to South Africa with the purpose of continuing its investigations. Any further evidence that was considered necessary was to be taken on the return to London. It was announced that all claims should be filed on or before April 25, 1901, that claimants might appear either in person or by counsel, and that the different governments might represent the combined claims of their respective citizens or subjects.

Mr. R. Newton Crane appeared before the commission on the part of the United States. In all, fifteen claims were presented. Five of these were presented by persons who alleged that they were native-born citizens of the United States, although no evidence was furnished as to the date or place of their birth. Eight alleged that they were naturalized citizens, while there were two who could produce no evidence whatever of their status. Eight had been deported

[59] H. Res., 178, 56 Cong., 1 Sess.; also H. R., Doc. 618, 56 Cong., 1 Sess.

[60] For. Rel., 1901, pp. 216–222.

on the suspicion of having been concerned in the Johannesburg plot to murder Lord Roberts and other English officers; one had been imprisoned at Natal as a Boer spy; another was captured on the field of battle while serving, as he alleged, with a Red Cross ambulance corps attached to the Boer forces; three others were compelled to leave the country for various reasons, while two more could produce no evidence that they had been forcibly deported; on the contrary it appeared that they had left South Africa voluntarily and at their own expense. The whole amount claimed was $52,278.29 on account of actual losses alleged. The commission heard all claims by means of an *ex parte* statement in each case, with the exception of two for which no statement had been presented. These last two had been mentioned as claimants by the Ambassador of the United States on October 24, 1900, in a communication to Lord Landsdowne, the English Secretary of State for Foreign Affairs, and were so presented to the consideration of the commission.

In dealing with the cases the commission did not insist upon any technical formality in the way of proof. The plan followed was to allow the legal representative of the English Government an opportunity to explain why each individual had been deported. The several claimants were then permitted to put in evidence to clear themselves of these charges. After the claims had all been considered in this way the English representative announced the wish of his government to "agree with the representatives of the various governments upon a lump sum to be received by each of the powers in full satisfaction of the demands of their respective claimants," it being understood that the British Government "was not to be concerned as to how the sums so paid were allocated among the various claimants."[61] This proposal was accepted by the United States and by the other governments represented.

With the announcement of the decision of the commis-

[61] For. Rel., 1901, p. 221.

sioners on October 28, 1901, Mr. Crane pointed out that it had been very difficult to determine the real merits of most of the claims. Difficulty had been experienced not only in ascertaining the real facts but in applying the principles of international law as well. Many of the facts alleged by the claimants were not substantiated, and it was only the considerate view taken by the British Government which made possible a settlement so favorable to the United States.

Holland put in a claim for £706,355 in behalf of 1139 persons who alleged that they were Dutch subjects, and received 5.3 per cent. of that amount, or £37,500, which was the highest actual award made, although the lowest percentage of the sum claimed. Germany received £30,000, or 12.22 per cent. of the amount claimed for 199 persons; Austria-Hungary £15,000, or 34.24 per cent. for 112 persons; Italy £12,000, or 28.52 per cent. for 113 persons; the United States £6,000, or 22.22 per cent. for 15 persons. But Mr. Crane called attention to the evident error of basing a calculation upon the relation the award in each case bears to the amount claimed. The amount claimed in most cases is not what the claimant thinks he is justly entitled to for the losses he has sustained, but is the amount which his "caprice or cupidity fixes as that which may possibly be allowed him."[62] Among the American claims a number included demands for "moral" damages, and these claims were larger than similar demands put in by citizens of other countries. Even among the American claimants themselves there was a wide divergence in appraising their losses, actual as well as moral. Of three in the same occupation, the same employment, the same domestic surroundings, deported together, at about the same time, and under almost identical circumstances, one demanded $5,220, the second appraised his losses at $11,112.50, and the third estimated his losses at $50,000.

With reference to the American claimants the conditions

[62] For. Rel., 1901, p. 221.

under which the persons were deported were practically the same, and there was little if any distinction as to social rank or grade of employment. Mr. Crane, therefore, seems justified in his conclusion that the idea conveyed by the percentage relation of the amount demanded to the amount actually awarded is misleading, and should not serve as a precedent without comment for similar claims in the future. A much fairer method for ascertaining what the award really amounts to is shown to be that of computing what average sum each claimant received, since the claimants were practically of one walk of life and employment and were deported under like conditions. Such a computation shows that the United States fared much better than any one of the other governments, the average sum received by each claimant being £428 11s. 5d., as compared with £150 15s. for Germany; £142 17s. 1d. for Russia; £133 18s. 6d. for Austria-Hungary; £133 6s. 8d. for Belgium; £125 for Norway and Sweden; and £106 3s. 10d. for Italy.

The £6,000 offered by the British Government as full compensation for all claims of citizens of the United States on account of wrongful arrest, imprisonment and deportation from South Africa up to October 26, 1901, was accepted by Secretary Hay. Only £4,000 had been originally offered, but the amount had afterward been increased to £6,000. Throughout the negotiations the attitude of the English Government was generous toward the United States. The claimants included good, bad and indifferent, some of whom were not entitled to compensation at all, since they were not citizens of the United States, while others had actually taken up arms against Great Britain. The average amount awarded to each alleged citizen of the United States was approximately $2000 as against $216 for each claimant of all other Governments taken together.

In a number of cases the claimants had contracted with local attorneys upon the basis of a contingent fee of 50 per cent. of whatever might be awarded. In one case the fee of the attorney presenting the claim amounted to $3750,

although his services consisted in merely filing memorials which were not supported by a single word of proof of the assertions they contained, even after ample time had been given for the introduction of such proof. Mr. Crane, therefore, urged that in future similar claims should be presented directly by the citizens themselves without the intermediation of attorneys. In the present cases he said that his requests to the attorneys for the different claimants to furnish evidence to meet the accusations of the British Government against their clients had met with no response whatever. He felt justified in believing that these attorneys had either given up the presentation of the claims of their clients or that the latter were dead. It was accordingly suggested that in either case the United States would be justified in refusing to pay over to the attorneys such sums as might be allotted to their clients until the latter had been directly communicated with. In this way they would have the opportunity to confirm or withdraw any powers of attorney which they might have executed for the collection of their respective claims.

CHAPTER II.

The Neutrality of European Powers.

The attitude of the European powers was generally observant of the requirements of neutrality in so far as governmental action could be proved. The frequent charges which Great Britain made that the Transvaal was recruiting forces in Europe were not proved against the States from which the recruits came. The numbers in the parties which perhaps actually joined the Boer forces were not large, and no formidable fitting out of an expedition or wholesale assistance was proved against any European government.

Germany, the power most nearly in touch with the Transvaal in South Africa with the exception of Portugal, early declared the governmental attitude toward the struggle. The German consul-general at Cape Town on October 19, 1899, issued a proclamation enjoining all German subjects to hold aloof from participation in the hostilities which Great Britain at that time had not recognized as belligerent in character. If insurgency be recognized as a distinct status falling short of belligerency, this was perhaps such a recognition, but it was in no sense an unfriendly act toward Great Britain. It was merely a warning to German subjects as to the manner in which they should conduct themselves under the circumstances. It did not recognize the Boers as belligerents in the international sense, but it warned German subjects that a condition of affairs existed which called for vigilance on their part in their conduct toward the contestants. Later, when the British Government announced that the war would be recognized retroactively as entitled to full belligerent status, Germany declared the governmental attitude to be that of strict neutrality in the contest. An attempt of the Boers to recruit in

Damaraland was promptly stopped by the German officers in control, who were ordered to allow neither men nor horses to cross the border for the purposes of the war. All German steamship lines which held subventions from the Government were warned that if they were found carrying contraband they would thereby forfeit their privileges. Stringent orders were also given by the different German ship companies to their agents in no case to ship contraband for the belligerents. The attitude assumed by the German Government was not entirely in accord with the popular feeling in Germany. On October 5 a mass-meeting at Göttingen, before proceeding to the business for which the conference was called, proposed a resolution of sympathy for the Boers: "Not because the Boers are entirely in the right, but because we Germans must take sides against the English."[1] But despite popular sentiment, the position which had been taken by the Government seems to have been consistently maintained.

In June, prior to the outbreak of war, President Kruger had been advised by the Dutch Minister for Foreign Affairs that the Transvaal should maintain a moderate attitude in the discussion of the questions at issue with the British Government. The German Government, too, had advised the Republics to invite mediation, but at that time President Kruger declared that the moment had not yet come for applying for the mediation of America. The United States, it was considered by both Holland and Germany, could most successfully have undertaken the role of mediator from the fact that England would have been more likely to entertain proposals of the kind coming from Washington than from a European capital.

In December, 1900, Count Von Bülow, the German Imperial Chancellor, speaking of the neutral attitude of Germany, declared that when President Kruger later attempted to secure arbitration it was not until feeling had become so heated that he was compelled to announce to the Dutch

[1] London Times, Weekly Ed., Oct. 5, 1899, p. 626, col. 2.

Government that it was not possible to arrange for arbitration. The German Government, it was declared, regarded any appeal to a Great Power at that time as hopeless and as very dangerous to the Transvaal. The German and the Dutch Governments each believed that President Kruger should not have rejected the English proposal then before him for a joint commission of inquiry.[2] The German Government had nothing for which to reproach itself in regard to the outbreak of war or with reference to the fate of the Republics. "Of course there are certain lengths to which we could not possibly go. We could not, in order to prevent the door from being slammed, let our own fingers be crushed between the door and the hinges; that would not have helped the Boers and would only have harmed ourselves,—and when the war had broken out it was impossible for us, in view of the general situation of the world and from the standpoint of German interests as a whole to adopt any attitude except that of strict neutrality."[3] Continuing, Count von Bülow pointed out the fact that the policy of a great country should not at a critical moment be governed by the dictates of feeling, but should be guided solely in accordance with the interests of the country, calmly and deliberately calculated.

The possibility of mediation with Germany in the role of mediator was shown to have been made conditional upon the acceptance of such a step by both the parties to the con-

[2] The German Chancellor seems slightly in error in assuming that the Transvaal *rejected* the English proposal for a joint inquiry. It will be remembered that immediately following the Bloemfontein Conference President Kruger had drafted a law considerably modifying the Transvaal demands in the conference, and later submitted the proposals of August 19, which he alleged had been "induced" by their implied acceptance on the part of the British agent. When these proposals lapsed from the fact of their non-acceptance by the British Government, he declared that he was ready to return to the discussion of the proposed joint commission of inquiry and was met by the English assertion that the condition of affairs no longer warranted a discussion of the original proposal for such a commission, and that Great Britain would have to formulate new demands to meet the altered conditions. The outbreak of war had forestalled these demands.

[3] Speech in Reichstag, London Times, Dec. 11, 1900, p. 5, col. 1.

test, as otherwise it would not have been mediation but intervention, with the ultimate possibility of the exercise of force for the purpose of stopping the hostilities. Intervention of that kind, involving the idea of coercion, was never considered by the German Government because of the general situation of the world and of special German interests. The idea of anything other than entirely peaceful and friendly intervention was not entertained by any power in considering the situation in South Africa. The German Chancellor declared that "even those Powers which academically ventilated the idea of peaceful mediation invariably and expressly laid stress upon the fact that they had no thought or intention of forcing England to accept peace against her will." He asserted that the possibility of mediation was thus excluded since the preliminary condition of such a course was the consent of both parties to the conflict.

Count Von Bülow also called attention to the fact that the gentlest form of diplomatic inquiry made by the United States had been rejected by the English Government "officially and categorically in the most distinct manner possible." And speaking officially, he continued, "We therefore did what we could as a neutral Power and without imperilling direct German interests in order to prevent the outbreak of war. In particular we acted in the most straightforward manner toward the governments of the South African Republics inasmuch as from the first and in good time we left them in no doubt regarding the situation in Europe and also regarding our own neutrality in the event of war in South Africa. In both these regards we made matters clear to the two South African Republics and did so in good time."[4] The Chancellor seems to have fairly defined the position maintained by the German Government throughout the war, although popular feeling often clamored for official action in behalf of the Boers.

A similar course was pursued by the French Government despite the fact that in France popular sympathy was more

[4] Speech in Reichstag, Dec. 10, 1900.

strongly in favor of the Transvaal than was the case in Germany. No official action, however, was taken which could involve France in complications in view of the declared neutral attitude assumed at the beginning of the war. The administration at Paris ordered the prefects throughout the country to have removed from the official minutes the resolutions of sympathy for the Boers which had been adopted by the provincial councils. But opposed to the correct attitude of the Government, popular feeling was manifested in different ways. A committee of ladies in Paris made a direct appeal to the French people. They declared: "We are not biased enemies of the British Nation . . . but we have a horror of grasping financiers, the men of prey who have concocted in cold blood this rascally war. They have committed with premeditation a crime of *lèse-humanité,* the greatest of crimes. May the blood which reddens the battle-fields of South Africa forever be upon their heads. . . . Yes, we are heart and soul with the Boers. . . . We admire them because old men and young women, even, are all fighting like heroes. . . . Alas! to be sure, there is no more a France, nor yet an America. . . . Ah! Ideal abode of the human conscience, founded by Socrates, sanctified by Christ, illuminated in flashes of lightning by the French Revolution, what has become of thee? There is no longer a common temple for civilized states. Our house is divided against itself and is falling asunder. Peace reigns everywhere save on the banks of the Vaal, but it is an armed peace, an odious peace, a poisoned peace which is eating us up and from which we are all dying."[5] Such hysterical outbursts in France were not taken seriously by the Government, and the feeling which inspired them was possibly more largely due to historic hatred of England than to the inherent justice of the Boer cause.

The Ninth Peace Conference, which was in session at Paris in the fall of 1900, without expressly assuming the right of interfering in the affairs of a friendly nation fur-

[5] London Times, April 2, 1900, p. 5, col. 5.

ther than to "emphatically affirm the unchangeable principles of international justice," adopted a resolution declaring that the responsibility for the war devastating South Africa fell upon that one of the two parties who repeatedly refused arbitration, that is, it was explained, upon the British Government; that the British Government, in ignoring the principles of right and justice, in refusing arbitration and in using menaces only too likely to bring about war in a dispute which might have been settled by judicial methods, had committed an outrage against the rights of nations calculated to retard the pacific evolution of humanity; that the Governments represented at the Hague had taken no public measures to ensure respect for the resolutions which should have been regarded by them as an engagement of honor; that an appeal to public opinion on the subject of the Transvaal was advocated and sympathy and admiration were expressed for the English members of the conference.[6]

The usual French attitude toward Great Britain was expressed in these resolutions, but the conference was not prepared to go so far as to adopt a resolution proposed by a member from Belgium expressing the hope that the mistake of depriving the Republics of their independence would not be committed, and favoring an energetic appeal to the powers for intervention. The resolution was rejected by a large majority on the ground that it would be impolitic and naturally irritating to England and without much probability of favorable results being attained.

When the delegation of the Boers which was sent to appeal to the European Powers for action in behalf of the Republics reached Paris in July, 1900, the attitude of the French Government was not altered, nor were the envoys encouraged to hope for intervention. They were received by the President but only in an informal and unofficial manner when presented by Dr. Leyds. When they reached Berlin in August neither the Emperor nor the Chancellor was in the city and consequently the visit had no official significance,

[6] London Times, Oct. 3, 1900, p. 3, col. 3.

but in St. Petersburg a more favorable reception awaited them. The Official Messenger announced on August 26 that Dr. Leyds had been received in audience by the Czar. This statement, coming as it did from the official organ of the Foreign Office, seemed to signify a full recognition of the accredited character of the delegation, and Dr. Leyds was referred to officially as "Minister of the South African Republic."[1] With the exception of the British Minister, he was received by all of the diplomatic corps, a courtesy which the members could not well have denied him, but as to practical results the mission to Russia amounted to nothing.

On their return to Germany the envoys received no official notice. The secret instructions which they had opened only upon reaching Milan were supposed to have contained certain communications which had been exchanged between the Governments of the Transvaal and Great Britain but which it was alleged had not been published in the Blue Books. This assertion of sinister motives on the part of Great Britain exerted little influence upon foreign governments in Europe. The delegation realized the impossibility of securing the interference of a concert of Powers or of any one State against the wishes of England. The mission of the Boers had been doomed to failure from the beginning.

The action of the Queen of Holland in receiving the delegation was generally understood as not of an unneutral character but as inspired by sympathy for a kindred people and a willingness to mediate though not to intervene. It was recognized that no nation whose interests were not directly concerned could afford to persist in offers of mediation in view of the fact that Great Britain had already intimated to the United States that such an offer could not be accepted. Although Holland refused to intervene, the attitude assumed by the Dutch Government in other respects caused severe criticism in England. The chief circumstance which confirmed the opinion that Holland as a neutral State had not displayed a proper attitude at Lorenzo Marques was

[1] London Times, July 26, 1900.

the fact that after the visit of the envoys of the Transvaal the Hague Government had sent a man-of-war to the island of St. Helena, which was being used as a prison for the Boers who were transported from South Africa. This proceeding was viewed by England as officious from the fact that foreign men-of-war were not usually received at that port. Popular feeling saw in the despatch of the man-of-war an unfriendly act which might easily have led to difficulty. But the incident, aside from the benevolent character which Holland had given to the enforcement of her neutrality laws throughout the war, had no significance in international law. It was generally considered, however, that the feeling which England manifested with regard to the visit of the cruiser gave some ground for the suspicion that the British Government might have had something to conceal at St. Helena.

The general attitude of Germany, France and Russia toward the Boer mission was guided by a policy of strict adherence to the neutral obligations assumed at the beginning of the war. These Powers in their official statements all followed such a course, realizing that it was demanded by a sound foreign policy. They considered the idea of intervention out of the question, although friendly interest for the Boers and for the peaceful purpose of their mission was evident.

From the beginning of the war the active duties of neutrality had fallen upon Portugal, since neither the Transvaal nor the Orange Free State possessed a seaport. Fifty miles of railway separated the Portuguese harbor of Lorenzo Marques in Delagoa Bay from the Transvaal border, and from this point the road continued to Pretoria. Lorenzo Marques being neutral could not be blockaded, but, being neutral, it was the duty of the Portuguese Government to observe the laws of neutrality. Great Britain alleged that a constant stream of supplies and recruits passed over the Portuguese border to aid the Boer armies. The difficulty on the part of the English Government, however, was to

prove that the goods were in fact on their way to a belligerent destination or that small parties of men were in reality organized bands of recruits for the fighting forces of the enemy. It was asserted that the manner in which Portugal performed her neutral obligations, demanding an absolutely impartial treatment of both belligerents, made Delagoa Bay and the port of Lorenzo Marques more valuable to the Republics than would have been the case had they actually been in their possession.

The efficiency of Portugal's performance of neutral duties varied during the war. As early as August 25, before negotiations had been broken off between the Transvaal and Great Britain, the Portuguese Governor at Lorenzo Marques refused to permit two cargoes of Mauser ammunition to land because it was consigned to the Transvaal. The ammunition was transferred to a Portuguese troop ship, and the Governor assigned as sufficient reason for his action the fact that Great Britain had urged the measure upon the Portuguese authorities. He stated that orders had been received from Lisbon that guns and ammunition for the Transvaal should not be landed until further notice from the Portuguese Government. The Transvaal strongly protested against this act as a breach of a treaty between the two Governments in which by Article VI the Portuguese Government was prohibited from stopping ammunition intended for the Transvaal, but upon representations by England might stop ammunition on its way to any English colony. The opinion in the Transvaal was that the act on the part of Portugal and Great Britain constituted an act of war, in that peaceable negotiations were still pending, a view which seems fully warranted since Portugal possessed no right to treat any traffic as contraband before war had begun. A petition was circulated at Pretoria advising the Government to discontinue negotiations pending with England looking to a peaceful settlement of the issues between the two Governments. Although this step was not taken, the protestations made by the Transvaal seem to have had their effect upon

the Portuguese authorities, for upon the outbreak of war the banks at Lorenzo Marques continued to accept Transvaal coin, and after the first flurry caused by the transition from peace to war the Transvaal notes were accepted at their face value.

By the middle of December the English Government had begun to view the condition of affairs at the port of Delagoa Bay and the town of Lorenzo Marques with grave dissatisfaction. It was publicly alleged that Lorenzo Marques was nothing more nor less than a base from which the Transvaal obtained everything that it needed. Further than this, it was declared that the town was the headquarters of Transvaal agents of every description who were in daily communication with their Government and with Europe. The English authorities felt themselves helpless to prevent the importation of machinery and other material required for the mines which were worked by the Transvaal Government. Even explosives for the government factory and actual ammunition reached the Transvaal by way of Lorenzo Marques because of the inability of the English cruisers to make a thorough search of foreign vessels bound for a neutral port and professedly carrying foodstuffs. British shippers alleged that while they were prohibited from trading with the enemy foreign shippers were reaping the profits and materially aiding in the prolongation of the war.

It later developed that the apparent neglect on the part of Portugal to observe a strict watch over the character of goods allowed to pass through to the Transvaal was not entirely due to the governmental attitude at Lisbon. It seems that the Dutch consul at Lorenzo Marques had taken over in the way of friendly offices the interests of the Orange Free State as well as those of the Transvaal. It was also ascertained that the consul of Holland was the manager of the local agencies for a number of steamboat companies, among them the Castle Packet Company, the African Boating Company, the British India, and the British and Colonial Steam Navigation Company. Only one English company

had put patriotism before profit and transferred its agency from the Dutch consul upon the outbreak of war.

The British Government was also handicapped by the fact that local British banks accepted the drafts issued by the Transvaal and Orange Free State. The Transvaal dies of 1899 and 1900 had been seized by the English, but despite this fact the coins issued with the date of the dies of 1897 and 1898 were freely used by the local English banks.[8] This unpatriotic action on the part of British subjects controlling the banks made easy the work of the Boer forwarding agents; it was alleged, and the fact seemed pretty well authenticated, that the Dutch consul, Mr. Pott, facilitated this work by allowing contraband to be landed at night. Such articles thrown into half-laden trucks upon the railway often reached the Transvaal without detection. Cases labelled "candles" were hoisted in without pretense of examination. It was alleged also that guns and fifty tons of shells had been landed in December under the very noses of two British warships, and that wholesale smuggling was going on with the connivance of a nominally neutral consular agent.

Under the protests of the British Government, however, orders arrived from Lisbon which revived an old law requiring all persons leaving Portuguese territory to obtain passports signed by the Governor-general. The applicants were required to give guarantees through their respective consuls that they were not going to the Transvaal for the purpose of enlisting. The Portuguese authorities took the matter in hand, and persons attempting to go without passports were promptly sent back. The customs authorities began a stricter watch over the Transvaal imports, and on January 19 seized as contraband three cases of signalling apparatus consigned to Pretoria.[9]

It was claimed, however, that of the imports of £30,500 to Delagoa Bay during December there had been forwarded to the Transvaal goods valued at not less than £21,000.

[8] London Times, Weekly Ed., Jan. 12, 1899, p. 20, col. 4.
[9] London Times, Weekly Ed., Jan. 19, 1900, p. 36, col. 3.

And it seemed evident to England, despite the more stringent port regulations, that the number of foreigners daily entering the Transvaal by way of Lorenzo Marques was far in excess of the number which would be desirous of going to Pretoria for peaceful purposes. Mr. Pott, it was still alleged, was acting as the head of a Boer organization for facilitating the entrance of men desiring to enlist with the Boer forces. He was consequently cautioned in January by the Portuguese Governor that if he recruited for the Boer forces or was detected doing anything inconsistent with the neutral obligations of Portugal, a request would be made to the Netherlands Government to have him transferred to another field. The Portuguese authorities at the same time began a closer supervision of the persons who were allowed to enter the Transvaal from Portuguese territory. The previous restriction that passports be signed by the respective consuls of persons leaving for Transvaal territory was considered insufficient, and the consuls of the different countries represented at Lorenzo Marques were informed that they must personally guarantee that the applicants whom they endorsed were not military men, and were not proceeding to assist the Boer forces in the field.

These restrictions, while giving evidence of Portugal's efforts to see that the neutrality of the port was respected, did not satisfy the English authorities. The latter still alleged that no doubt existed as to the fact that Lorenzo Marques was being used by Boer agents as a recruiting station for the Transvaal forces. It was asserted that large numbers of "men of military stamp" landed daily at Lorenzo Marques from all parts of Europe, and were allowed to proceed to the Transvaal for the purpose of either actually enlisting with the Boers or working the government mines. It was alleged, too, that a number of these newcomers were "smart looking men," evidently officers. The majority, however, were of a low class, mostly penniless adventurers. On February 2 the report was made to the English authorities that twenty of the better sort, many

wearing riding boots and carrying field glasses, had left Lorenzo Marques for the Transvaal, and as tending to throw suspicion upon the purpose of their journey, a Transvaal detective was "most assiduous" in his attentions to them.[10] The influence of the consul of Holland largely defeated all efforts to stop entirely the imperfect fulfillment of the duties of neutrality incumbent upon the port.

At other places any attempts to convey prohibited goods into the Transvaal were summarily stopped. Arms and ammunition which the Boers attempted to land at Inhambane were seized by the Portuguese customs authorities on the ground that they were consigned under a false description. The consignment was not a large one and the attempt was evidently made as an experiment. This incident, too, indicates the extremity to which the Transvaal authorities had been reduced by the increased watchfulness at Lorenzo Marques, for the distance from the port of Inhambane to the Transvaal could be covered only by native carriers and required fourteen days for the trip. The difficulties in evading the customs surveillance at Lorenzo Marques had also been increased by the fact that most of the steamship companies which had at first employed the Dutch consul as their agent had later relieved him of this duty. But, notwithstanding the continued protests by England, the Hague Government seemed reluctant to take any official notice of the evident partiality of its consular agent. With reference to the English protests the Administration took the view that while acting as the representative of the Transvaal and Orange Free State during the war Mr. Pott was only fulfilling the duties incumbent upon him in this triple capacity.

As the war progressed, although the administration of the customs at Lorenzo Marques was made more efficient, this improvement was inversely proportional to the successes of the Boer forces in the field. Under the circumstances it was almost impossible for England to prove that actual governmental support had been given to any scheme for

[10] London Times, Weekly Ed., Feb. 5, 1900, p. 84, col. 2.

augmenting the military forces of the Transvaal, but the whole manipulation of the customs seemed to be controlled by a weak administration not too scrupulous in seeing that an impartial view was taken of the situation. The failure of the Boers to attain their ends in the field did more to improve the efficiency of the administration of the customs than the protests of England. It seems unquestionable that the resources of the Transvaal had induced the Portuguese authorities at Lorenzo Marques to display toward the Boers an attitude which, according to obsolete ideas, was termed benevolent neutrality. But as the Boer hopes declined the Portuguese authorities increased their vigilance, and in the end went as far in favor of England as they had previously gone in their benevolent attitude to the Republics. Passengers arriving by German and other steamers were refused passports upon the instance of the British consul where there was a strong suspicion that they were entering the Transvaal for purposes hostile to Great Britain.

Portugal, too, refused to accept the offer of the Transvaal to advance the amount required of the Lisbon Government by the Beirne Arbitration Award.[11] The Portuguese Government, in courteously declining the offer, stated that the amount had already been provided. Great Britain, who already held a preemptive title to Delagoa Bay, was also ready to advance the money, but was denied this privilege by Portugal.

By August, 1900, it had become evident that the Boer hopes of bringing the war to any sort of favorable conclusion were doomed to failure. On August 4 all the customs officials at Lorenzo Marques were dismissed and their places filled by military officers, and a force of twelve hundred men was sent out from Lisbon two days later. The Portuguese frontier was put under a strong guard and all Boer refugees who arrived were summoned before the Governor and warned against carrying on any communications with the Transvaal Government or with the Boer forces still

[11] London Times, Weekly Ed., April 20, 1900, p. 244, col. 2.

in the field. Notice was given them that if they were detected in such transactions they would be sent out of Portuguese territory and the right of asylum denied them. And in the further performance of her neutral duties at such a time Portugal assumed an entirely correct attitude.

In September three thousand Boers evacuated their position along the frontier and surrendered to the Portuguese Governor. They were lodged in the barracks at Lorenzo Marques and later, to prevent any disturbance in the town that might be caused by their presence, were removed to the Portuguese transports lying in the harbor. The Governor gave notice to the English commander who had occupied the position evacuated by the Boers that all the Transvaal troops which had surrendered were being guarded and would not be allowed to rejoin the Boer forces still in the field. A number of the refugees agreed to surrender to the British commander as prisoners of war upon the stipulation that they would not be sent out of the country, and thus better terms were obtained than by those captured in the field. Others who surrendered to Portugal were transported by Portuguese ships to Lisbon, land being assigned them in the country where they were given permission to settle.

In other respects, also, during the later phases of actual warfare, Portugal maintained a correct attitude. Especially was this attitude noticeable with reference to the investigation of the conduct of the Dutch consul at Lorenzo Marques. In spite of the protests of Great Britain and of Portugal as to his unneutral attitude he had been continued in his position. But on December 7, 1900, the strain to which the relations between the two Governments had been put reached the breaking point. The Dutch Minister, Dr. Van Weede, withdrew from Lisbon and at the same time the Portuguese Minister at the Hague, Count de Selin, returned to Lisbon.

The reason for this technical breaking off of friendly relations was explained on December 11. A member of the Second Chamber at the Hague, M. Van Bylandt, questioned the Minister for Foreign Affairs as to the cause of the diffi-

culties between the two Governments. M. Beaufort, in his explanation of the situation, stated that as early as November 17, 1899, the Dutch Government had been informed that it would be necessary for the Lisbon authorities to cancel the exequatur of Mr. Pott as consul at Lorenzo Marques. This cancellation of the agent's credentials, it was alleged, was deemed necessary on account of irregularities with reference to the transshipment of contraband of war from Lorenzo Marques to the Transvaal. It was further represented to the Dutch Government that the consul under suspension had made an improper use of his position as the acting consular agent for the Free State and the Transvaal; he had taken advantage of the consular privileges accorded him at Lorenzo Marques as the representative of a neutral Power at a neutral port; the courteous communications made by the Portuguese Government prior to the final withdrawal of his exequatur had not received from the Hague Government the attention they deserved; every opportunity had been given the Dutch Government to take the initiative in the matter by merely recalling their agent, but this step had not been taken.

M. Beaufort admitted that this had been the attitude of the Portuguese Government, but asserted that he had not cared to suspend Mr. Pott without an inquiry, and for this purpose had merely granted him leave of absence for three months. This action, he said, had not been favorably received in Lisbon, and he had therefore thought it necessary to warn the Portuguese Government that the withdrawal of the consul's exequatur would be considered an unfriendly act. But notwithstanding the warning, the consul's credentials had been cancelled by the Lisbon Government. As a consequence of this act M. Beaufort had requested the Dutch Minister at Lisbon to come to the Hague that he might take part in a personal interview with the consul under suspension. Later, M. Beaufort stated that the specific incidents upon which Mr. Pott's conduct had been arraigned were the illegal importation of heliographic apparatus for the Transvaal artillery and a wrongful grant of passports in his dual

capacity as consular agent for Holland and the Republics.[12]

In the end diplomatic relations were resumed between the two Governments. Holland, after an investigation of the charges against her consul, acquiesced in the action of the Lisbon Government. But the incident served to demonstrate the fact that the Government at Lisbon was aware of the inefficient manner in which the duties of neutrality had been enforced at Lorenzo Marques by the port administration.

From this time on to the close of the war the Portuguese Government displayed greater care in asserting the neutral character of the port. By placing the town under military supervision this purpose was more surely attained, and the only other charge made against Portugal for the failure to perform a neutral duty came from the Transvaal Government, an allegation of a more serious character than any that had been advanced by the English Government. The grounds upon which Portugal granted a privilege of war to one of the belligerents under protest from the other have not been made so clear as the reasons which led to her apparent dereliction of duty at Lorenzo Marques. This incident placed the Portuguese Government in an unfavorable light with regard to its duty in the full and impartial performance of the obligation of neutrality. British troops were allowed to pass across Portuguese territory in order to reach belligerent British territory commanding the Transvaal position on the north. From Rhodesia, the nominal objective point in this movement of troops, the Transvaal might be conveniently invaded from the north, as it was already attacked on the south.

Early in the war the British South Africa Company, a chartered company which was responsible for the administration of the Rhodesian Government, became apprehensive as to the fate of this section of the country should the Boers decide to invade it. Troops had been raised in Rhodesia for the war but were employed outside the colony. It was

[12] London Times, March 1, 1900, p. 5, col. 3.

asserted that this fact had left the province in such an unprotected state that, aside from the fear of a Boer invasion, a Kaffir uprising was imminent.

Mr. Chamberlain had refused to send forces into Rhodesia in December upon the ground that troops could not be spared. But it was finally arranged to send five thousand mounted men, some of them to be enlisted in Rhodesia and all of them to be furnished outside of England. Before the end of January, 1899, a commander had been appointed from the English army, and it was expected that the forces would be upon the borders of Bechuanaland by the end of May.

Difficulty at once arose with reference to the right of passage of these troops, military stores, and in fact a full equipment for warlike purposes. There was not much choice of routes. Those through the Transvaal and through Bechuanaland were closed. The only route left was through the port of Beira. This course necessitated the passage of belligerent troops across two hundred miles of neutral territory controlled by Portugal as territorial sovereign. Beira, situated about four hundred and fifty miles north of Lorenzo Marques, bears nearly the same relation topographically to British Mashonaland and to British Rhodesia that Delagoa Bay does to the Transvaal and the Orange Free State. A railway nearing completion formed an almost continuous route from Beira to Salisbury in Rhodesia, and once in the latter province troops would be in a position to invade the Transvaal.

Under ordinary circumstances it would have been a distinct breach of neutrality on the part of Portugal to allow the passage across her territory of the troops of one of the belligerents, since the obvious destination could only be the country of the other belligerent, with whom she was on friendly terms. Portugal had granted to England in 1896 the right of passage for a field force to be used against the natives in Mashonaland.[13] But that was a case of warfare

[13] Times Military History of the War in South Africa, Vol. IV, p. 365.

against a savage tribe, and was not to be considered as a reliable precedent for similar action against a civilized State such as the South African Republic.

The principles of the international law of modern times leave little or no doubt as to the proper course for a neutral to follow in such a case. Oppenheim says: "In contradistinction to the practice of the eighteenth century, it is now generally recognized that a violation of the duty of impartiality is involved when a neutral allows a belligerent the passage of troops or the transport of war material over his territory. And it matters not whether a neutral give such permission to one of the belligerents only, or to both alike."[14] And Lawrence points out that "it is now acknowledged almost universally that a neutral state which permits the passage of any part of a belligerent army through its territory is acting in such a partial manner as to draw down upon itself just reprobation." The permission given of necessity "to further a warlike end" is "therefore inconsistent with the fundamental principle of state neutrality." "These considerations," he says, "have influenced practice during the present century, and the weight of modern precedent is against the grant of passage in any case."[15]

Mr. Baty, who has made a careful study of the precedents upon the subject, states that while "writers vary in their treatment of the question" of the passage of troops over neutral territory, "the modern authorities are all one

[14] International Law (1906), Vol. II, p. 345.

[15] Principles of International Law, p. 526. The older writers differed from this view. Grotius maintained the right of passage, even by force; Vattel practically agreed with Grotius that it might be taken by force, but contended that it should be asked and force used only under extreme necessity, or when the refusal was unjust; Wheaton denied that the right of passage was a "perfect right" and consequently could not be enforced against the will of the neutral; Hall, International Law (1880), § 219, points out that more recent writers take an opposite view, namely, that a grant of passage is incapable of impartial distribution. See also Wheaton, International Law, § 427; Vattel, Droit des gens, III, § 110; Calvo, Droit international, 3d Ed., III, §§ 2344–2347.

way."[16] He points out that the jurists of the first half of the nineteenth century, with the possible exception of Klüber, were "unanimous in following" Grotius and Vattel, and allowing neutrals to permit belligerents passage as long as they did it impartially. But since the middle of the century a total and violent change in the opinion of authors has operated. Every modern author holds that passage is now a benefit which must be refused absolutely, and not offered impartially.[17]

In February the Transvaal Government had attempted to bring troops into Rhodesia by way of Portuguese territory. Portugal had promptly sent out forces to prevent such an evasion of Portuguese neutrality and had guarded the railway bridges along the line to Rhodesia. And in March Great Britain had met with a refusal to allow a large quantity of foodstuffs, mules, and wagons to be landed at Beira for the purpose of transportation to Rhodesia. Nevertheless, on April 9, General Sir Frederick Carrington landed at Cape Town under orders to proceed immediately to Beira.[18] He was to use transports put at his disposal by his government for the purpose of collecting a full equipment for his command of five thousand men to be mobilized at Beira, and from that port was to enter Rhodesia. This province was then to be made the base for an expedition against Pretoria in concert with the English forces advancing from the south.

It is undoubted that the laws of neutrality demanded of Portugal not only an impartial treatment of both belligerents, as the earlier writers held, but an absolute prohibition against such a warlike expedition by either of them, as unanimously held by all the more recent authorities. At the time English public expression contended that absolute equality of neutrality was not incumbent upon independent States in the performance of their neutral duties. English

[16] International Law in South Africa, p. 71.
[17] *Ibid.*, p. 73.
[18] Times Military History of the War in South Africa, Vol. IV, p. 369.

writers spoke of a "benevolent neutrality" as possible, and cited such cases as that in 1877, when Roumania, before taking an active part in the war against Turkey, permitted Russian troops to march through her territory; and the incident which occurred during the Neuchâtel Royalist insurrection in 1856 when the Prussian Government requested permission to march through Wurtemberg and Baden "without any idea of asking those states to abandon their neutrality, or assist Prussia against Switzerland."

It was alleged upon the authority of such precedents that the privilege of passage for troops might be granted by Portugal to England without a breach of neutrality really occurring. Portugal would be merely giving her neutrality a benevolent character towards one of the belligerents, which it was asserted she was perfectly entitled to do, a view of the situation which is too obsolete in the light of modern times to need criticism. Although public opinion throughout Europe is usually hostile to England when she is at war, the general condemnation of the proposed use of neutral territory seems therefore to have been well founded in this particular case.

The Cabinet at Paris refused to entertain any question or debate on the proposed passage of English troops through Portuguese territory. On April 11, however, a discussion of the subject occurred in the Chamber of Deputies in which two interpellations were announced by the President. One of these questioned the Government as to what steps had been taken to protect French interests in Mozambique; the other had reference to the proposed passage of English troops inland from Beira. M. Delcasse said that the Chamber did not feel that the Government should discuss a current question of international law, but he pointed out the fact that France with the other Great Powers had declared her neutrality at the beginning of hostilities. He added, however, that it was not the part of France to guarantee the neutrality of others. One member asserted that the proposed act would be a distinct violation of her

neutral duties by Portugal. Another declared that Europe, by concerted action, should prevent such a flagrant violation of neutrality during a war in which a small nation was already contending against great odds; that France, surrounded by neutral nations, could not afford to see such a precedent established and should appeal to Europe to join with her in protesting.

Although such concerted action as was proposed by the different members was improbable, and although the proposals may have been dictated by the usual French bias in situations where English interests are at stake, these opinions indicate pretty well the real sentiment in Europe at the time.

The Transvaal Government formally notified Portugal that the passage of British troops and munitions of war through Beira would be considered in the Transvaal as tantamount to hostile action. Nevertheless, on May 1, the Chamber of Deputies at Lisbon rejected an interpellation made by one of its members to question the action of the Government with reference to the privilege which Great Britain sought. The Minister for Foreign Affairs, however, stated that the Transvaal Government had not ordered the Portuguese consul to leave Pretoria. He denied emphatically that any incident whatever had followed Portugal's notification to the Transvaal. When further interrogated, the Minister declared that the English troops had been granted permission to use the railway inland from Beira upon the plea of treaty rights already possessed by Great Britain. No power, he asserted, had protested except the South African Republic. It was promised that the Government would later justify its action in granting the permission by producing the documents showing the right of England to the privilege, but it was not considered convenient at that time to discuss the question.[19]

The protest of the Transvaal against the alleged breach of neutrality on the part of Portugal was without effect,

[19] London Times, April 21, 1900, p. 7, col. 3.

and this was the only means the Republic had of declaring itself. To have entered upon hostile action against Portugal at that time would have had only one result, the stoppage of all communication with the outside world by way of Delagoa Bay. The British forces were sent into Rhodesia, and though the subsequent part they played in the war was not important the purpose of the expedition was admitted. It was to cut off any possibility of a retreat northward into British territory by the Boer forces which were being driven back by the English advance upon Pretoria. The British military plan was that General Carrington should march with his forces and reach Pretoria from the north at the same time that General Roberts reached that point from the south.[20] Thus, the end for which the troops were to be used was not to quell an insurrection of the natives in Rhodesia, as was alleged, but to incorporate the expedition into the regular campaign of the war against the Republics. This being the case, the contractual grounds upon which the English Government claimed the right of passage should have been beyond question in order to furnish a justification for Portugal or for England in what is viewed by international law writers of the present day as a distinct breach of neutrality. When the expedition was sent out the statement was made that England was merely availing herself of existing treaty rights, but it was felt necessary to add that the action was not illegal as was that of the Boers in making Delagoa Bay their virtual base earlier in the war. And on May 31, in legalizing the proceeding, the Cabinet at Lisbon also felt impelled to say that the Portuguese Government had not become an instrument of British ambition; that it was not a question of putting into execution in the territory of Mozambique conventions recently concluded with England, but merely of profiting by stipulations agreed upon in the treaty of 1891 between Great Britain and Portugal. President Kruger was, therefore, informed that the legality of the incident was not to be questioned at Pretoria.

[20] Times Military History, Vol. IV, p. 364 ff.

The consensus of opinion among European Powers was that the landing of troops at Beira and the passage by rail to Rhodesia with the consent of Portugal constituted a breach of neutrality on the part of the latter. The opinion was freely expressed that the British Government not only placed a strained interpretation upon the only basis for her action, the treaty of 1891, but that even upon this interpretation she possessed no real servitude over the territory used by her for warlike purposes. The only claim of justification advanced by the British Government which would appear at all tenable rests upon the statement of Calvo: "It may be that a servitude of public order, or a treaty made antecedently to the war, imposes on a neutral State the obligation of allowing the passage of the troops of one belligerent." "In such a case," Calvo concludes, "the fulfilment of the legal obligation cannot be regarded as an assistance afforded to that belligerent and a violation of the duties of neutrality."[21]

Basing his argument largely upon this authority, Mr. Baty asserts that Calvo approves the granting of passage where this privilege has been secured by previous treaty. But the following statement which he cites from Calvo, taken in connection with the rule given above, would appear to deny this conclusion: "During war neutrals may oppose, even by force, all attempts that a belligerent may make to use their territory, and may, in particular, refuse one of the belligerents a passage for its armies to attack the enemy; *so much the more so, inasmuch as the neutral who should allow a passage of the troops of one belligerent would be*

[21] Baty, Int. Law in South Africa, p. 73, quoting Calvo. But Calvo calls attention to the fact that this is his own "exception to the general rule," in support of which he cites no authorities and only one precedent—that of the passage of foreign troops across the Canton of Schaffhausen in 1867 by virtue of a prior treaty between Switzerland and the Grand Duchy of Baden. Obviously no general conclusion can be drawn from the conduct of a neutralized state, such as Switzerland. The general rule, not the exception, is sought in determining international rights. Droit international, 3d Ed., III, § 2347.

false to its character and would give the other just cause of war." [22]

What Calvo says is: "Tous les publicistes sont d'accord pour admettre que le territoire d'une nation constitue une véritable propriété . . . le territoire neutre doit être à l'abri de toutes les entreprises des belligérants de quelque nature qu'elles soient; les neutres ont le droit incontestable de s'opposer par tous les moyens en leur pouvoir, même par la force des armes, à toutes les tentatives qu'un belligérant pourrait faire pour user de leur territoire." [23] He also calls attention to the fact that Grotius, Wolff and other authors held that a belligerent, "dont la cause est juste peut, pour aller à la rencontre de son ennemi, traverser avec ses armées le territoire d'une nation neutre." [24] But his statement of the modern rule is conclusive: "Par contre, Heffter, Hautefeuille, Manning et d'autres auteurs modernes se sont avec juste raison élevés contre des principes dans lesquels ils entrevoient la négation implicite des droits et des devoirs stricts de la neutralité. A leur yeux, la nation neutre qui consent au passage les troupes de l'une des parties belligérantes manque à son caractère et donne à l'autre partie un juste motif de lui déclarer la guerre." [25]

Mr. Baty, without reaching any definite conclusion in the matter, admits that the point to be decided in any case is not so much the fact that there is an antecedent treaty, as the nature of that treaty. He says, "If it granted a real right of way of the nature of a right *in rem* there is no reason why the way should be stopped against troops any more than why a purchaser of territory should be debarred from using it as a base of military operations." But he points out, "If the treaty only created a right *in personam* the case is different." In the latter case it is obvious that the power which claims the way depends entirely on the promise of the

[22] Int. Law in South Africa, p. 73. This quotation is slightly misleading, but even as used it clearly denies the English claim.
[23] Calvo, § 2344.
[24] *Ibid.*, § 2345.
[25] *Ibid.*, § 2346.

territorial power for the exercise of that advantage. "In such a case," he concludes, "it may well be that the performance of its promise by the territorial power becomes unlawful, on the outbreak of war between the promiser and a third party."[26] For international purposes the true test is, "Could the power claiming the right of way, or other servitude, enforce its claims during peace time by force, without infringing the sovereignty of the territorial power?" Mr. Baty's opinion is that "if it could, and, if the servitude is consequently a real right," the promisee might use its road in time of war, and the owner of the territory would be "bound to permit the use, without giving offense to the enemy who is prejudiced by the existence of the servitude."[27] But he continues, "If the right of way is merely contractual, then the fulfillment of the promise to permit it must be taken to have become illegal on the outbreak of war and the treaty cannot be invoked to justify the grant of passage." It is asserted that in the former case where a real servitude, a right *in rem,* was possessed, to stop the use of the road would be analogous to the seizure by a neutral of a belligerent warship to prevent its being used against the enemy. In the case where the treaty grants the so-called right *in personam,* a merely contractual or promissory right exists, and the exercise of the right would be analogous to the sale of a warship to a belligerent by the neutral granting the permission stipulated in the treaty. Mr. Baty is of the opinion that while the belligerent might have "a right *in rem* to the ship so far as the civil law was concerned," it would have only a "quasi-contractual right *in personam* against the state in whose waters it lay, to allow it to be handed over." Obviously, the performance of that duty, to hand over the vessel, "would have become illegal when hostilities broke out."[28]

We have seen in previous pages that the consensus of opinion among international law authorities of modern times

[26] Int. Law in South Africa, p. 74.
[27] *Ibid.,* p. 74.
[28] *Ibid.,* p. 75.

is that a neutral should in no case whatever allow the use of its territory for the purposes of a belligerent expedition against a State with which it is upon friendly terms. But granting the contention made by Mr. Baty that such a thing as a real servitude may exist in international relations, let us examine the stipulations in the treaty of June 11, 1891, by which it has been alleged this right was secured to England.

If the British Government possessed a right *in rem*, then to all intents and purposes it owned the road internationally, in war as well as in peace, for all the uses to which a road is usually put, namely, that of transporting all kinds of goods, warlike or peaceable. If England only possessed a right *in personam*, this right was a valid one in times of peace and for the purposes stipulated by the terms of the treaty, but became void in time of war, and, being purely personal in character, depended upon the promise of the State through which the road passed. In the former case it would be a "right of way" in peace or in war. In the latter case it would be merely a "license to pass," for the granting of which Portugal would have to show valid reasons in view of her neutral duties.

The parts of the treaty which may by any possibility apply to the case are Articles 11, 12, and 14.[29]

A portion of Article 11 reads: "It is understood that there shall be freedom for the passage of the subjects and goods of both powers across the Zambesi, and through the districts adjoining the left bank of the river situated above the confluence of the Shiré, and those adjoining the right bank of the Zambezi situated above the confluence of the river Luenha (Ruenga), without hindrance of any description and without payment of transit dues."[30]

The only applicable portion of Article 12 says: "The

[29] British and Foreign State Papers, Vol. 83, pp. 27–41, Treaty between Great Britain and Portugal, defining the Spheres of Influence of the two Countries in Africa, signed at Lisbon, June 11, 1891, ratifications exchanged at London, July 3, 1891.

[30] *Ibid.*, p. 34.

Portuguese Government engages to permit and to facilitate transit for all persons and goods of every description over the water-ways of the Zambezi, the Shiré, the Pungwe, the Busi, the Limpopo, the Sabi and their tributaries; and also over the land ways which supply means of communication where these rivers are not navigable." [31]

The only other clause of the treaty which bears on the case is a portion of Article 14: "In the interests of both Powers, Portugal agrees to grant *absolute freedom of passage* between the British sphere of influence and Pungwe Bay for *all merchandise* of every description and to give the necessary facilities for the improvement of the means of communication."[32]

It is obvious that Article 14 could not apply to anything more warlike than "*merchandise*" being transported from Pungwe Bay, where Beira is situated, to the British sphere of influence. It is admitted by Mr. Baty that Article 12 is inapplicable to any routes other than the water-ways specified and the land routes and portages auxiliary to them. It is also admitted that the only other stipulation that might apply, Article 11, "obviously applies to the territory far to the north, and concerns the question of access to British Central Africa." [33]

Mr. Baty, however, contends that it was not a new right, that of passage through Portuguese territory, but was one created by this treaty. Upon the supposition that if the right still existed in times of war it must have been by virtue of Article 11, he says, "The question arises, 'Was it such a grant as could be valid in war time?'" [34]

It should be remembered that Mr. Baty has concluded that Calvo asserts the possibility of a neutral, without violating its neutral obligations, allowing a belligerent to pass troops over neutral territory for the purpose of attacking a State which is on friendly terms with the Government granting

[31] British and Foreign State Papers, Vol. 83, p. 36.
[32] *Ibid.*, pp. 39–40. Italics our own.
[33] International Law in South Africa, p. 76.
[34] *Ibid.*, p. 76.

the privilege. Mr. Baty asserts that a real easement existed in favor of England if she might "force her way along" the routes stipulated in the treaty, "without going to war with Portugal." But he says this interpretation is always "subject to the consideration, that the terms of the treaty do not seem to contemplate the use of the road as a military road at all," a conclusion which would seem to settle the question, and deny that any shred of justification existed for the use to which neutral territory was put in time of war. But Mr. Baty in the same breath says: "There can be such a thing as a military road across neutral territory. The German Empire has such a road across the canton of Schaffhausen, and there used to be one between Saxony and Poland. But it seems very questionable whether the roads indicated by the treaty of 1891 were not simply commercial, and not for the purposes of war at all." [35] And this English writer reluctantly admits, "The treaty has, therefore, to be pressed very far to cover the grant of an overland passage for troops from Beira inland." [36]

The conclusion reached by Mr. Baty is far more favorable to England than the circumstances of the case warrant. "One may regret," he says, "that the British Government should have found it necessary to place a somewhat strained interpretation on a treaty which, even then did not give them in anything like clear terms, an absolute servitude of the kind contended for." [37]

Such a conclusion is misleading in the first place because the British Government was contending for a right which was not recognized among independent nations at the time the treaty was formed; in the second place, granting that ancient authorities may have declared the possibility of such a right existing in time of war, the stipulations of the treaty itself are the strongest argument against the interpretation used by England. Hall has pointed out that, "When the language of a treaty, taken in the ordinary meaning of the

[35] International Law in South Africa, p. 77.
[36] *Ibid.*, p. 76.
[37] *Ibid.*, p. 77.

words, yields a plain and reasonable sense, it must be taken to be read in that sense." [38] The only reasonable sense in which the stipulations of the British-Portuguese treaty of 1891 could be taken was that of a purely commercial agreement. The spirit of the treaty, the general sense and the context of the disputed terms all seem to indicate that the instrument considered only times of peace and became absolutely invalid with reference to the transportation of troops in time of war. The authority already cited says, "When the words of a treaty fail to yield a plain and reasonable sense they should be interpreted by recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, improper, ambiguous, or obscure passages, or by the provisions of the instrument as a whole." [39]

Unquestionably the provisions of the instrument as a whole yield but one meaning. The treaty is not broad enough to sustain the passage of troops in time of war. Nor would there seem to be any plausibility in the claim that certain mutual explanations exchanged between the two Governments at the time of the signing of the treaty gave tenable ground for the fulfilment of such a right as that which was granted by Portugal.

The words of the Portuguese notification to the Transvaal condemn the action of Portugal rather than justify the proceeding in view of the requirements of the neutrality of the present day. This communication read: "The Portuguese Government has just been informed that in accordance with the mutual explanations exchanged in the treaty of 1891 with regard to the right of moving troops and material of war through the Portuguese territory in South Africa into English territory and *vice versa,* the British Government has just made a formal demand for all troops and material of war to be sent through Beira to the English hinterland. The Portuguese Government cannot refuse the demand and must fulfill a convention depending on reciprocity, a convention which was settled long before the present state of

[38] International Law (1880), p. 281.
[39] Hall, Int. Law (1880), p. 283.

war had been foreseen. This agreement cannot be regarded as a superfluous support of one of the belligerent parties or as a violation of the duties imposed by neutrality or indeed of the good friendly relations which the Portuguese Government always wishes to keep up with the Government of the South African Republic."[40] The fact that the assent of the Portuguese Government was obtained only after ten weeks of pressure brought to bear upon the Lisbon authorities would seem to indicate that intrigue is more potent in international relations than accepted precedent.

In its reply to the Portuguese despatch the Transvaal reasonably protested that the treaty in question had not been made public and that no notice of it had been received by the Republic at the outbreak of war.[41] It was pointed out that this being the case the treaty could not be applied even if it granted the right contended for by England. And even stronger was the Transvaal argument that in no case after war had begun could such a treaty be applied by a neutral State to the disadvantage of third parties. The fact of neutrality had suspended the working of the agreement. The action of Portugal, it was justly alleged, put her in the position of an enemy instead of a neutral.

The Transvaal contention would appear to be fully warranted. In the light of modern international law the action of England in sending troops through neutral Portuguese territory against a nation at peace with Portugal was based upon a flagrant misreading of a purely commercial treaty. The action of the Portuguese Government in allowing this to be accomplished was a gross breach of the duties incumbent upon a neutral State in time of war.

[40] Times Military History of the War in South Africa, Vol. IV, p. 366, note.
[41] *Ibid.*, p. 367, note.

CHAPTER III.

Contraband of War and Neutral Ports.

During the war the question of blockade could not arise for the reason that neither the Transvaal nor the Orange Free State possessed a seaport. Lorenzo Marques being a neutral Portuguese possession could not be blockaded by the English. General Buller, commanding the British land forces in South Africa, had indeed urged that such a declaration be made, but it was realized by Great Britain that such a step was not possible under the laws of war.[1] More stringent measures, however, were taken to prevent the smuggling of contraband through Delagoa Bay, a transaction which the English alleged was an everyday occurrence. A number of neutral merchantmen bound for this port were seized, but the difficulty experienced by England was her inability to prove that the goods on board were really intended for the enemy, or that the men shown as passengers were actually proceeding to the Transvaal as recruits for the Boer forces in the field.

On October 18 the ship *Avondale Castle* had been arrested by the English gunboat *Partridge* and ordered to return under escort to Durban. The British cruiser *Tartar* there took over £25,000 in gold which, it was alleged, had been intended for the Transvaal Government. It was found, however, that the gold was consigned to the Delagoa branch of the Transvaal Bank from the Durban branch of the same institution. The allegation against the consignment, it was considered by the prize court, did not sufficiently contaminate the shipment since the destination was proved to be a neutral one and the point of departure an English port. In February the gold was returned to the

[1] Sessional Papers of the House of Commons, Royal Commission on the War in South Africa, Appendices to Minutes of Evidence being C. 1792 (1903).

Bank of Durban because the ultimate destination of the consignment did not warrant the presumption that it was enemy's property.

In November a French steamer, the *Cordoba,* was hailed by the British cruiser *Magicienne.* The *Cordoba* refused to recognize the signal to halt seventy miles out from Lorenzo Marques and was brought to by a blank shot. Her papers, however, failed to show any guilt on her part and she was allowed to proceed to her port of destination, Lorenzo Marques.

These seizures indicate the feeling of suspicion which was prevalent in England that apparently innocent descriptions in the bills of lading of steamers arriving at Lorenzo Marques concealed contraband of war. The question was raised whether the English commanders should not be ordered to open packing cases and the like and not examine merely the manifests in order to furnish evidence which would warrant the confiscation of the goods and possibly the ships carrying contraband, should such be found on board. The Council of the British and Foreign Arbitration Association sent a resolution to the English Government and to that of Portugal which declared: "This association most earnestly and emphatically protests against the permission granted by Portugal to the Boers of the Transvaal to make of Lorenzo Marques an emporium for the collection of arms and ammunition against Great Britain with whom the king of Portugal is at peace . . . thereby . . . enlarging the sphere of the present carnage in South Africa."[2]

It was alleged in England that at the beginning of the war, when the Portuguese Government believed victory certain for Great Britain and only a matter of brief hostilities, the administration at Lorenzo Marques had put a certain amount of restraint upon the extent to which the port might be used as a base of warlike supplies, but had later relaxed this proper restriction. The only remedy possible to be

[2] London Times, Weekly Ed., Dec. 29, 1899, p. 821, col. 1.

applied by England was the right of patrol outside the three mile limit, but the detection of forbidden forms of commerce was practically impossible. Undoubtedly not only food but munitions of war as well were brought in concealed in the holds of merchantmen and by other devices. To examine the ships properly at sea it was estimated would have required three weeks or more, and it was declared that such an examination alone could have insured Great Britain in her rights, since the bills of lading were evidently fictitious. Recruits came in on the ships in question as waiters, as sailors, as passengers, and when landed were sent on to Pretoria. With permanent offices at the Hague, Dr. Leyds, it was asserted, was the recruiting agent of the Transvaal, and was successful in sending out men from Germany, Belgium, Russia, Sweden, Holland, Ireland, and as a matter of fact from the whole of Europe as a great recruiting station.

It was this state of affairs that impelled the English Government to assume an attitude toward neutral commerce which it was found difficult to maintain against other nations whose interests were involved. The points in the British position which were most violently attacked were the classification of foodstuffs as contraband in certain cases, and the application which was made of the doctrine of "continuous voyages," not to absolute contraband of war or to goods seeking to cross the line of an established blockade, but to other classes which are usually considered free.

There seems little certainty as to the exact circumstances under which a belligerent may treat foodstuffs as contraband, although it is generally admitted that under certain conditions such goods may be so considered. On the other hand doubt is expressed by many writers upon international law as to whether it is ever possible to treat as contraband of war such articles as are necessary for the sustenance of a people.

Contraband as is well known is generally held to consist of two kinds, first, absolute contraband such as arms, ma-

chinery for manufacturing arms, ammunition and any materials which are of direct application in naval or military armaments; second, conditional contraband, consisting of articles which are fit for but not necessarily of direct application to hostile uses.

The first class is always liable to capture and confiscation, but with regard to the second class no unanimity of opinion exists. Disputes always arise as to what articles, though not necessarily of direct applicability to hostile uses, may nevertheless be considered contraband of war. This question is especially difficult of solution with reference to foodstuffs when seized on their way to a belligerent in neutral bottoms.

The case of seizure which occurred during the war involved not only the question of foodstuffs as contraband but brought up also the applicability of the doctrine of "continuous voyages," where the article being conveyed to a belligerent by stages were goods which, except under unusual circumstances, have generally been held to be free from the taint of contraband character. Great Britain has held that provisions and liquors fit for the consumption of the enemy's naval or military forces may be treated as contraband. In the case of the seizure of "naval or victualling" stores her rule has been their purchase without condemnation in a prize court.[3]

France in 1885 declared rice to be contraband when shipped from the southern to the northern ports of China, with whom she was at war. But in declaring that all cargoes so shipped were to be considered as contraband the French Government made a distinction as to their intended or probable destination and use. Great Britain protested at that time, but as no cases came before French prize courts we have no way of judging of the French declaration and its value as a precedent. But the majority of the authorities upon the principles of international law admit that foodstuffs which are destined for the use of the

[3] Holland, Manual of Naval Prize Law (1888), p. 24.

enemy's army or navy may be declared contraband in character. The practice of the United States, of Great Britain and of Japan has been to follow this rule. Russia in 1904 declared rice and provisions in general to be contraband. When Great Britain and the United States protested against this decision the Russian Government altered its declaration so far as to include foodstuffs as conditional contraband only. Germany has held that articles which may serve at the same time in war and peace are reputed contraband if their destination for the military or naval operations of the enemy is shown by the circumstances.

All authorities seem to agree that contraband to be treated as such must be captured in the course of direct transit to the belligerent, but the difficulty nearly always arises as to what shall be considered direct transit. One rule has been that the shipment is confiscable if bound for a hostile port, another that it is only necessary to show that the ultimate destination of the goods is hostile. The latter rule was declared to apply in the American case of the *Springbok,* an English merchantman conveying goods in 1863 from a neutral port to a neutral port, but, it was alleged, with the evident intention that the goods should reach by a later stage of the same voyage the belligerent forces of the Southern Confederacy, then at war with the United States.[4] In this case, however, the conclusive presumption was that the character of the goods themselves left no doubt possible as to their ultimate destination. The guilt of the vessel was not based upon the ground of carrying contraband but upon a presumption that the blockade established over the Southern States was to have been broken. Both the ship and its cargo were condemned by the district court of southern New York, but the cargo alone was later considered liable to condemnation by the Supreme Court of the United States. Great Britain at the time noted an exception to the decision,

[4] Sessional Papers of the House of Commons, Correspondence respecting the Seizure of the British Vessels "Springbok" and "Peterhof" by United States Cruisers in 1863, Miscl. No. 1 (1900), C. 34.

but refused to take up claims on the part of the English owners against the United States Government for indemnity. Earl Russell, in refusing the request of the owners for intervention by Great Britain, said in part: "A careful perusal . . . of the judgment, containing the reasons of the judge, the authorities cited by him in support of it, and the . . . evidence invoked . . . goes . . . to establish that the cargo of the *Springbok,* containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau [the alleged destination], but was either destined merely to call there, or to be immediately transshipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and to proceed to its real port of destination, being a blockaded port." [5]

This case is often cited as containing an application of the doctrine of "continuous voyages" to contraband *per se.* But it seems that the primary question was not one of contraband. The guilt of the ship lay rather in the intention, presumed upon the evidence, that a breach of an actual blockade was ultimately designed. The Supreme Court in reviewing the decision of the lower court said: "We do not refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for we repeat again, contraband or not, it could not be condemned if really destined for Nassau, and not beyond, and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports are under blockade." [6] In other words, the decision was upon presumption and not upon the evidence in the case; upon the presumption that a breach of blockade was premeditated and not upon the ground that the cargo was contraband. The fact that the cargo was of a character which did not seem likely to be incorporated into the stock in trade of the Nassau popula-

[5] Sessional Papers of the House of Commons, p. 39.
[6] *Op. cit.,* p. 45.

tion gave the judges whatever justification there was for the presumption that the goods were intended to be transshipped without breaking bulk. A recent English writer, Mr. Atherley-Jones, who criticises this decision of the Supreme Court of the United States as a verdict based upon the principle of the expediency of the moment and not upon the usual rules of evidence, admits that if a vessel sails with the intention of violating a blockade there is no question of the character of the port from which she sets out but insists that there is no necessity in such a case to apply the doctrine of "continuous voyages." If it can be proved, he says, that she is going to a blockaded port, it does not matter whether she is going to a neutral one or not, but it must be made clear that she is going to a blockaded one. He points to the fact that suspicion can never prove this apart from the ship's papers, the admission of the ship's company and the situation and course of the vessel. His view of the case is that the Supreme Court as well as the lower courts of the United States "accepted well founded surmise as to a vessel's destination in lieu of proof," and he adds, "the danger of such a departure needs no further comment." [1]

The first position taken by Great Britain to support her right of seizure of foodstuffs bound for Delagoa Bay seems to have been based upon this departure of the Supreme Court of the United States in the case of the *Springbok* in 1863. It was found, however, that this basis of justification would not be acceptable to other Powers generally nor to the United States when the doctrine of "continuous voyages" was given such an application as practically to include foodstuffs as contraband. Without the taint of contraband there could be no justification even upon the *Springbok* decision as a precedent, since there was no blockaded port in question. In the seizure of American goods which were being conveyed by British ships there was the possibility of a violation of a municipal regulation which forbade British subjects to trade with the enemy.

[1] Commerce in War (1907), p. 255.

But the charge of trading with the enemy to gain plausible ground necessarily carried with it the further presumption that the ultimate intention was that the foodstuffs should reach the Transvaal by a later stage of the same voyage.

With reference to the arrest and detention of German mail steamers bound for Delagoa Bay, the English Government found the attempt to substitute possibly well-grounded suspicions for facts no more acceptable to third Powers than the assumption with regard to foodstuffs had been, if the emphatic statements of the German Government indicate the general opinion upon the subject of the carrying of analogues of contraband and unneutral service in general.

GERMAN SEIZURES. BUNDESRATH, HERZOG AND GENERAL.

THE BUNDESRATH.—It was reported to the English Government by Rear Admiral Sir Robert Harris, on December 5, 1899, that the German East African mail steamer *Bundesrath* had sailed from Aden for Delagoa Bay. He informed his Government that ammunition was "suspected but none ascertained;" that the *Bundesrath* had on board "twenty Dutch and Germans and two supposed Boers, three Germans and two Australians believed to be officers, all believed to be intending combatants, although shown as civilians; also twenty-four Portuguese soldiers."[8] On the twenty-ninth of the same month the *Bundesrath* was taken into Durban, about three hundred miles from Lorenzo Marques, under the escort of the British cruiser *Magicienne*. The German Government demanded the immediate release of the steamer upon the assurance made by the Hamburg owners that she carried no contraband. Great indignation was expressed in Hamburg, and a demand was made in the Chamber of Commerce that measures be taken to insure the protection of German commercial interests. A diplomatic note was sent by Germany protesting against

[8] Sessional Papers of the House of Commons, Correspondence respecting the Action of Her Majesty's Naval Authorities with reference to Certain Foreign Vessels, Africa No. 1 (1900), C. 33, p. 1.

the action of England. Lord Salisbury's reply on the part of his Government was that the *Bundesrath* was suspected of carrying ammunition in her cargo, and that it was known that she had on board a number of passengers who were believed to be volunteers for service with the Boers. He added, however, that no official details had been received other than those contained in the cable announcing the fact that the ship had been captured.[9] The German consul at Durban protested against the ship's being brought in there as prize, and his Government reiterated its request that she be released at once since she carried no contraband. The detention of a mail ship, it was asserted, interfered with public interests in addition to the loss which was inflicted upon the owners of the vessel.

Admiral Harris reported on December 31 that the *Bundesrath* had changed the position of her cargo on being chased, a fact which was considered suspicious; that a partial search had revealed sugar consigned to a firm at Delagoa Bay, and railway sleepers and small trucks consigned to the same place. It was expected that a further search would reveal arms among the baggage of the Germans on board who admitted that they were going to the Transvaal. England's senior naval officer at Durban was of the opinion that there was ample ground for discharging the cargo and searching it. The request was accordingly made that authority be given for throwing the ship into a prize court, and that instructions be forwarded as to the proper disposal of the passengers on board.

Despite the protest of Germany that the *Bundesrath* carried neither contraband nor volunteers for the Transvaal, instructions were issued that a prize court should take over the ship and a search be at once made by competent authorities. Orders were given at the same time, however, that until it became evident that the *Bundesrath* was carrying contraband, "other German mail steamers should not be arrested on suspicion only."[10]

[9] *Ibid.*, pp. 2–3.
[10] *Ibid.*, p. 4.

Instructions were also issued by the British Government that application be made to the prize court for the release of the mails; that if they were released they were to be handed over to the German consul and to be hastened to their destination, "either by an English cruiser if available, or by a mail steamer, or otherwise."[11] It was pointed out that the ship and its cargo, including the mails, were in the custody of the court and except by the order of that tribunal should not be touched. It was urged, however, that every facility for proceeding to his destination be afforded to any passenger whom the court considered innocent.

The German consul at Durban reported that no contraband had been found on the *Bundesrath* although a thorough search had been made. The failure to discover goods of a contraband character apparently rendered the action of Great Britain's naval authorities unjustifiable. Germany indeed insisted that had there been contraband disclosed even this fact would not have given England any right to interfere with neutral commerce from one neutral port to another and insisted that the task of preventing the transmission of contraband to the Transvaal lay with the Portuguese Government.[12] The fact was also pointed out that when war first broke out, the steamship company owning the *Bundesrath* had discharged shipments of a contraband character at Dar-es-Salaam as well as at Port Saïd in order to obviate any possible complication, and since then had issued strict orders that contraband should not be embarked.

Great Britain expressed herself as "entirely unable to accede to . . . the contention that a neutral vessel was entitled to convey without hindrance contraband of war to the enemy, so long as the port at which she intended to land it was a neutral port."[13] The novel suggestion was made by Germany that "the mail steamer be allowed to go on bail so as not to interfere more than was necessary with her voyage," but the English representative doubted the

[11] *Ibid.*, pp. 5–6; Chamberlain to Hely-Hutchinson, Jan. 3, 1900.
[12] *Ibid.*, p. 7; Lascelles to Salisbury, Jan. 5, 1900.
[13] *Ibid.*, p. 7; Salisbury to Lascelles, Jan. 4, 1900.

practicability of such a plan. He was in favor of the suggestion if it could be adopted under suitable conditions, but since the ship had probably gone into the hands of the prize court, that tribunal, he said, would have to act independently.

On January 5 the mails and the passengers were released by order of the court and were taken on board the German warship, *Condor,* for Delagoa Bay. But not until two weeks later were the ship and its cargo released.[14] The only reason assigned by the court for the release was that no contraband had been discovered by the search.

Since the three cases which attracted most attention, the *Bundesrath,* the *Herzog,* and the *General,* with a few unimportant exceptions as to details, were similar in regard to the points of law involved, the facts in the remaining cases will be outlined. It will then be possible to discuss the grounds upon which Great Britain asserted the right of seizure, and the objections which Germany made to the English assertion.

The Herzog.—On December 16, 1899, a cable from the commander-in-chief of the Mediterranean station announced to the British Foreign Office that the German "steam-ship" *Herzog* had left the Suez Canal on the twelfth for South Africa carrying "a considerable number of male passengers, many in khaki, apparently soldiers" although "no troops were declared." On the same day an inquiry was made by the commander at the Cape whether "a number of passengers dressed in khaki" could be "legally removed" from the *Herzog*.[15] On the twenty-first the senior naval officer at Aden reported that the *Herzog* had sailed on the eighteenth for Delagoa Bay conveying, "probably for service in the Transvaal, about forty Dutch and German medical and other officers and nurses."[16] Although instructions had been issued on the first of January that neither the *Herzog* nor any other German mail steamer should be arrested "*on sus-*

[14] *Ibid.,* p. 22; Hely-Hutchinson to Chamberlain, Jan. 18, 1900.
[15] *Ibid.,* p. 1; Admiralty to Foreign Office, Nos. 1 and 2.
[16] *Ibid.,* pp. 2, 4, 11.

picion only" until it became evident that the *Bundesrath,* which was then being searched, really carried contraband, the *Herzog* was taken into Durban as prize on the sixth by the British ship *Thetis.*

The consul at Durban as well as the commander of the German man-of-war *Condor* protested in the name of their Government against the seizure of the *Herzog.* They urged that the vessel be allowed to proceed since her captain had given the assurance that there were no contraband goods on board; that the only suspected articles were the mails, and certain small iron rails and railway sleepers which were destined for the neutral port of Delagoa Bay. On board the *Herzog,* however, there were three Red Cross expeditions, one of which had no official connection with the legitimate Red Cross societies. It had no official character but had been organized by a committee, the "Hilfs Ausshuss für Transvaal in Antwerp."[17] The other Red Cross expeditions were legitimate, one being German and the other Dutch.

On the seventh instructions were issued that the *Herzog* be released at once, unless guns or ammunition were revealed by a summary search. But on the following day the order was added that proceedings might be discontinued and the ship released unless "provisions on board are destined for the enemy's Government or agents, and are also for the supply of troops or are especially adapted for use as rations for troops."[18] On the ninth the *Herzog* was released, arrangements having been made two days before for the passage of one of the passengers, the Portuguese Governor of Zambesi, to Delagoa Bay by the *Harlech Castle.*

The General.—On the fourth of January the senior naval officer at Aden had reported to the English admiralty that the German vessel *General,* another East African mail steamer, was under detention there upon strong suspicion

[17] *Ibid.,* p. 16.
[18] *Ibid.,* pp. 14, 16.

and was being searched.[19] The German Government at once entered a strong protest and demanded in rather brusque terms "that orders be given for the immediate release of the steamer and her cargo, for that portion of her cargo which has already been landed to be taken on board again, and for no hindrances to be placed in the way of the ship continuing her voyage to the places mentioned in her itinerary." Count Hatzfelt, the German representative in London, continued: "I am further instructed to request your Excellency [the Marquis of Salisbury] to cause explicit instructions to be sent to the Commanders of British ships in African waters to respect the rules of international law, and to place no further impediments in the way of the trade between neutrals."[20]

To the form and imputations of this request the British Government took exception, and the situation appeared ominous for a time. Instructions had been issued, however, that unless the *General* disclosed contraband after a summary search it was undesirable to detain the ship since she carried the mails. The report of the naval officer at Aden disclosed the fact that he had boarded and detained the ship at that place. The ground for his action was that he had been informed that a number of suspicious articles were on board for Delagoa Bay, including boxes of ammunition stowed in the main hold, buried under reserve coal. An inspection of the manifest had shown several cases of rifle ammunition for Mauser, Mannlicher and sporting rifles consigned to Mombasa, but this consignment was believed to be *bona fide*. Other suspected articles on the manifest were wagon axles and chemicals and at the bottom of the hold was a consignment of food for Delagoa Bay, with boilers and heavy machinery stowed on top of the reserve coal. The *General* carried besides a number of Flemish and German passengers for Delagoa Bay, in plain clothes but of "military appearance," some of whom were believed to be

[19] *Ibid.*, p. 6.
[20] *Ibid.*, p. 8.

trained artillerymen. It was suggested that this last doubt could be cleared up only by a search of the private baggage of the persons suspected, but it was not considered by the British Foreign Office that there was "sufficient evidence as to their destination to justify further action on the part of the officers conducting the search."[21]

On the seventh the *General* was released, but was not able to sail until the tenth, a delay due to the labor of restowing her cargo, which was done as quickly as possible. The crew of the English ship *Marathon,* assisted by one hundred coolies, having worked day and night after the arrival of the ship on the fourth, completed the search on the sixth but were unable to complete the restowal until the morning of the tenth.

The Judicial Aspects of the Seizures.

In the discussion which occurred during the detention, and which was continued after the release of the three German ships, the assertions made by the British and German Governments brought out the fact that English practice is often opposed to Continental opinion in questions of international law.

On the fourth of January the German Ambassador in London had declared that his Government, "after carefully examining the matter" of the seizure of the *Bundesrath,* and considering the judicial aspects of the case, was "of the opinion that proceedings before a Prize Court were not justified."[22] This view of the case, he declared, was based on the consideration that "proceedings before a Prize Court are only justified where the presence of contraband of war is proved, and that, whatever may have been on board the *Bundesrath,* there could have been no contraband of war, since, according to recognized principles of international law, there cannot be contraband of war in trade between neutral ports."

[21] *Ibid.,* p. 22; see also pp. 10, 17, 21.

[22] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 6; Hatzfelt to Salisbury, Jan. 4, 1900.

He asserted that this view was taken by the English Government in the case of the *Springbok* in 1863 as opposed to the decision of the Supreme Court of the United States sitting as a prize court on an appeal from the lower district court of the State of New York.[23] The protest of the British Government against the decision of the United States court as contravening these recognized principles, he said, was put on record in the Manual of Naval Prize Law published by the English Admiralty in 1866, three years after the original protest. The passage cited from the manual read: "A vessel's destination should be considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral," and "the destination of the vessel is conclusive as to the destination of the goods on board." In view of this declaration on the part of Great Britain toward neutral commerce Count Hatzfeldt contended that his Government was "fully justified in claiming the release of the *Bundesrath* without investigation by a Prize Court, and that all the more because, since the ship is a mail-steamer with a fixed itinerary, she could not discharge her cargo at any other port than the neutral port of destination."[24]

In his reply to the German note Lord Salisbury thought it desirable, before examining the doctrine put forward, to remove certain "errors of fact in regard to the authorities" cited. He emphatically declared that the British Govern-

[23] This case, it will be remembered, was *not* decided on the ground of the contraband character of the goods in the cargo but because of the presumption that the ultimate intention of the ship was to break the blockade established over the Southern States. This well founded suspicion, based upon the character of the cargo as tending to show that it could be intended only for the forces of the Southern Confederacy, led to the conclusion that a breach of blockade was premeditated. This presumption no doubt was correct and in this particular case the decision of the court was probably justified, but the course of reasoning by which the conclusion was reached was generally considered a dangerous innovation in international relations. It has been recently again asserted that the decision was not based upon the accepted rules of evidence. Supra p. 24. For a clear statement of the latter view, see Atherley-Jones, Commerce in War, p. 255.

[24] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 6; Hatzfeldt to Salisbury, Jan. 4, 1900.

ment had not in 1863 "raised any claim or contention against the Judgment of the United States' Prize Court in the case of the *Springbok*." And he continued: "On the first seizure of that vessel, and on an *ex parte* and imperfect statement of the fact by the owners, Earl Russell, then Secretary of State for Foreign Affairs, informed Her Majesty's Minister at Washington that there did not appear to be any justification for the seizure of the vessel and her cargo, that the supposed reason, namely, that there were articles in the manifest not accounted for by the captain, certainly did not warrant the seizure, more especially as the destination of the vessel appeared to have been *bona fide* neutral, but that, inasmuch as it was probable that the vessel had by that time been carried before a Prize Court of the United States for adjudication, and that the adjudication might shortly follow, if it had not already taken place, the only instruction that he could at present give to Lord Lyons was to watch the proceedings and the Judgment of the Court, and eventually transmit full information as to the course of the trial and its results." He asserted that the real contention advanced in the plea of the owners for the intervention of the British Government had been that "the goods [on board the *Springbok*] were, in fact, *bona fide* consigned to a neutral at Nassau;" but that this plea had been refused by the British Government without "any diplomatic protest or . . . any objection against the decision . . . nor did they ever express any dissent from that decision on the grounds on which it was based."[25]

This assertion is fairly based upon the reply of the English Government to the owners on February 20, 1864. Earl Russell had expressly declared that his government could not interfere officially. "On the contrary," he said, "a careful perusal of the elaborate and able Judgment, containing the reasons of the Judge, the authorities cited by him in support of it, and the important evidence properly invoked from the cases of the *Stephen Hart* and *Gertrude*

[25] *Ibid.*, p. 18; Salisbury to Lascelles, Jan. 10, 1900.

(which her majesty's government have now seen for the first time) in which the same parties were concerned," had convinced his Government that the decision was justifiable under the circumstances.[26] The fact was pointed out that the evidence had gone "so far to establish that the cargo of the *Springbok,* containing a considerable portion of contraband, was never really and *bona fide* destined for Nassau, but was either destined merely to call there or to be immediately transhipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that Colony, and then to proceed to its *real destination,* being a *blockaded port.*"[27] The "complicity of the owners of the ship, with the design of the owners of the cargo," was "so probable on the evidence" that, in the opinion of the law advisers of the Crown, "there would be great difficulty in contending that this ship and cargo had not been rightly condemned." The only recourse of the owners was consequently the "usual and proper remedy of an appeal" before the United States Courts.

The next point that Count Hatzfeldt made was not so squarely met by Lord Salisbury, namely, that the manual of the English Admiralty of 1866 expressly declared: "A vessel's destination shall be considered neutral, if both the point to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral." And again, "The destination is conclusive as to the destination of the goods on board." Count Hatzfeldt contended that upon this principle, admitted by Great Britain herself, Germany was fully justified in claiming the release of the ship without adjudication since she was a mail-steamer with a fixed itinerary and consequently could not discharge her cargo at any other port than the neutral port of destination.[28]

The only reply that Lord Salisbury could make was that the manual cited was only a general statement of the prin-

[26] Sessional Papers, Miscl., No. 1 (1900), C. 34, pp. 39–40; Russell to Lyons, Feb. 20, 1864.
[27] *Ibid.* Italics our own.
[28] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 6.

ciples by which British officers were to be guided in the exercise of their duties, but that it had never been asserted and could not be admitted to be an exhaustive or authoritative statement of the views of the British Government. He further contended that the preface stated that it did not treat of questions which would ultimately have to be settled by English prize courts. The assertion was then made that while the directions of the manual were sufficient for practical purposes in the case of wars such as had been waged by Great Britain in the past, they were quite inapplicable to the case which had arisen of war with an inland State whose only communication with the sea was over a few miles of railway to a neutral port. The opinion of the British Government was that the passage cited to the effect "that the destination of the vessel is conclusive as to the destination of the goods on board" had no application. "It cannot apply to contraband of war on board a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country."[29]

Lord Salisbury then cited Bluntschli as stating what in the opinion of the British Government was the correct view in regard to goods captured under such circumstances: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war and confiscation will be justified."[30] And, basing his argument upon this authority, he insisted that his Government could not admit that there was sufficient reason for ordering the release of the *Bundesrath*

[29] *Ibid.*, pp. 18–19. Salisbury to Lascelles, Jan. 10, 1900.

[30] "Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi, il y aura contrebande de guerre, et la confiscation sera justifiée." Droit Int. Codifié, French translation by Lardy, 1880, 3d Ed., § 813. One of the two cases cited in support of this opinion is that of the *Springbok*, but in § 835, Rem. 5, the following statement is made: "Une théorie fort dangereuse a été formulé par le juge Chase: 'Lorsqu'un port bloqué est le lieu de destination du navire, le neutre doit être condamné, même lorsqu'il se rend préalablement dans un port neutre, peu importe qu'il ait ou non de la contrebande de guerre à bord.'"

"without examination by the Prize Court as to whether she was carrying contraband of war belonging to, or destined for, the South African Republic." It was admitted, however, that the British Government fully recognized how desirable it was that the examination should be carried through at the earliest possible moment, and that "all proper consideration should be shown for the owners and for innocent passengers and all merchandise on board of her."[31] It was intimated that explicit instructions had been issued for this purpose and that arrangements had been made for the speedy transmission of the mails.

The German Government, agreeing for the moment to put to one side the disputed question of trade between neutral ports in general, nevertheless insisted that since a preliminary search of the *Bundesrath* had not disclosed contraband of war on board there was no justification for delivering the vessel to a prize court. The suggestion was made that future difficulty might be avoided by an agreement upon a parallel of latitude down to which all ships should be exempt from search. And although it was not found possible to reach an exact agreement upon this point, orders were issued by Great Britain that the right of search should not in future be exercised at Aden or at any place at an equal distance from the seat of war and that no mail steamers should be arrested on suspicion alone. Only mail steamers of subsidized lines were to be included, but in all cases of steamers carrying the mails the right of search was to be exercised with all possible consideration and only resorted to when the circumstances were clearly such as to justify the gravest suspicion.[32]

It is interesting to note in the positions taken by the German and English Governments with regard to the theory of ultimate destination and continuous voyages a wide divergence of opinion. The British Government apparently based its contention upon the decision of the United States

[31] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 19; Salisbury to Lascelles, Jan. 10, 1900.
[32] *Ibid.*, pp. 19–22.

Supreme Court in the case of the *Springbok* in 1863, namely, that a continuous voyage may be *presumed* from an intended ultimate hostile destination in the case of a *breach of blockade,* the contraband character of the goods only tending to show the ultimate hostile intention of the ship. But the English contention went further than this and attempted to apply the doctrine to contraband goods ultimately intended for the enemy or the enemy's country by way of a neutral port which, however, was not and could not be blockaded. The German Government contended on the other hand that this position was not tenable and apparently repudiated the extension of the continuous voyage doctrine as attempted by England.

In the end the immediate dispute was settled upon the following principles: (1) The British Government admitted, in principle at any rate, the obligation to make compensation for the loss incurred by the owners of the ships which had been detained, and expressed a readiness to arbitrate claims which could not be arranged by other methods. (2) Instructions were issued that vessels should not be stopped and searched at Aden or at any point equally or more distant from the seat of war. (3) It was agreed provisionally, till another arrangement should be reached, that German mail steamers should not be searched in future on suspicion only. This agreement was obviously a mere arrangement dictated by the necessity of the moment, and was not such as would settle the question of the extent to which the doctrine of continuous voyages might be extended in dealing with contraband trade or with alleged traffic of this character.

Count Von Bülow, the German Chancellor, speaking before the Reichstag with reference to the seizures of the German mail steamers said: "We strove from the outset to induce the English Government in dealing with neutral vessels consigned to Delagoa Bay, to adhere to that theory of international law which guarantees the greatest security to commerce and industry, and which finds expression in

the principle that *for ships consigned from neutral states to a neutral port, the notion of contraband of war simply does not exist.* To this the English Government demurred. We have reserved to ourselves the right of raising this question in the future, in the first place because it was essential to us to arrive at an expeditious solution of the pending difficulty, and secondly, because, in point of fact, the principle here set up by us has not met with universal recognition in theory and practice."[33]

Summing up what in the opinion of the German Government corresponded most closely with the general opinion of the civilized world, the Chancellor then declared: "We recognize the rights which the Law of Nations actually concedes to belligerents with regard to neutral vessels and neutral trade and traffic. We do not ignore the duties imposed by a state of war upon the ship owners, merchants, and vessels of a neutral state, but we require of the belligerents that they shall not extend the powers they possess in this respect beyond the strict necessities of war. We demand of the belligerents that they shall respect the inalienable rights of legitimate neutral commerce, and we require above all things that the right of search and of the eventual capture of neutral ships and goods shall be exercised by the belligerents in a manner conformable to the maintenance of neutral commerce, and of the relations of neutrality existing between friendly and civilized nations."[34]

This doctrine, namely, that "for ships consigned from neutral states to a neutral port, the notion of contraband simply does not exist," clearly defined the contention of Great Britain that contraband which "at the time of seizure" was "consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country," is liable to seizure and that both ship and cargo may be confiscated.[35] It also denied the

[33] Sessional Papers, Africa, No. 1 (1900), C. 33; p. 25, Jan. 19, 1900. Italics our own.
[34] *Ibid.*, p. 25.
[35] *Ibid.*, p. 19; Salisbury to Lascelles, Jan. 10, 1900.

English contention that "provisions on board . . . destined for the enemy's Government or agents, and . . . also for the supply of troops or . . . especially adapted for use as rations for troops" may be seized as contraband.[36]

Count Von Bülow summarized the action of the German Government by saying: "We demanded in the first place the release of the steamers. . . . In the second place we demanded the payment of compensation for the unjustified detention of our ships and for the losses incurred by the German subjects whose interests were involved. . . . Thirdly, we drew attention to the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war, or at any rate, in places north of Aden. . . . Fourthly, we stated it to be highly desirable that the English Government should instruct their Commanders not to arrest steamers flying the German mail flag. . . . Fifthly, we proposed that all points in dispute should be submitted to arbitration. . . . Lastly, the English Government have given expression to their regret for what has occurred. We cherish the hope that such regrettable incidents will not be repeated. We trust that the English naval authorities will not again proceed without sufficient cause, in an unfriendly and precipitate manner against our ships."[37]

The Chancellor at the same time set forth certain general propositions as a tentative system of law to be operative in practice, a disregard of which in the opinion of the German Government would constitute a breach of international treaties and customs:

(1) "Neutral merchant ships on the high seas or in the territorial waters of the belligerent Powers . . . are subject to the right of visit by the warships of the belligerent parties." It was pointed out that this was apart from the right of convoy, a question which did not arise in the cases under discussion. The proposal was not intended to apply to waters which were too remote from the seat of war and a special agreement was advocated for mail ships.

[36] *Ibid.*, p. 16; Admiralty to Harris, Jan. 8, 1900.
[37] Speech in Reichstag, Jan. 19, 1900.

"(2) The right of visit is to be exercised with as much consideration as possible and without undue molestation.

"(3) The procedure in visiting a vessel consists of two or three acts according to the circumstances of each case; stopping the ship, examining her papers, and searching her. The two first acts may be undertaken at any time, and without preliminary proceeding. If the neutral vessel resists the order to stop, or if irregularities are discovered in her papers, or if the presence of contraband is revealed, then the belligerent vessel may capture the neutral, in order that the case may be investigated and decided upon by a competent Prize Court.

"(4) By the term 'contraband of war' only such articles or persons are to be understood as are suited for war and at the same time are destined for one of the belligerents." "The class of articles to be included in this definition," it was intimated, "is a matter of dispute, and with the exception of arms and ammunition, is determined, as a rule, with reference to the special circumstances of each case unless one of the belligerents has expressly notified neutrals in a regular manner what articles it intends to treat as contraband and had met with no opposition.

"(5) Discovered contraband is liable to confiscation; whether with or without compensation depends upon the circumstances of each case.

"(6) If the seizure of the vessel was not justified the belligerent state is bound to order the immediate release of the ship and cargo and to pay full compensation."

It was the view of the German Government according to these principles, and in view of the recognized practice of nations, that it would not have been possible to lodge a protest against the stopping on the high seas of the three German steamers or to protest against the examination of their papers. But by the same standard, it was contended that the act of seizing and conveying to Durban the *Bundesrath* and the *Herzog,* and the act of discharging the cargoes of the *Bundesrath* and *General,* were both undertaken upon

insufficiently founded suspicion and did not appear to have been justified.

The end of the discussion between Great Britain and Germany left the somewhat uncertain doctrine of continuous voyages still unsettled. As applied in 1863 distinctly to a breach of blockade it was generally considered an innovation. As applied, or attempted to be applied, by Great Britain in 1900 to trade between neutral ports at a time when no blockade existed or was in fact possible, it failed to receive the acquiescence of other nations who were interested. The discussion, however, rendered apparent a clear line of cleavage between English practice and Continental opinion.

Mr. Lawrence characterizes as "crude" the doctrine of the German Chancellor, that neutral ships plying between neutral ports are not liable to interference; that, in order for the ship to be legitimately seized, there must be contraband on board, that is, goods bound for a belligerent destination, and that this could not occur where the destination was a neutral port and the point of departure a neutral port. He declares that if this doctrine were accepted the offense of carrying contraband "might be expunged from the international code;" that "nothing would be easier for neutrals than to supply a belligerent with all he needed for the prosecution of his war."[38] He points out the danger of the acceptance on the part of the Powers of such a doctrine by citing the hypothetical case of France engaged in war, and asserts that under such circumstances even arms and ammunition might be poured into the neutral port of Antwerp and carried by land to the French arsenals. If Germany should be at war, munitions of war might be run in with practically no hindrance through the neutral harbors of Jutland. If Italy were at war, Nice or Trieste might be used in the same manner for the Italian Government to secure arms and ammunition.

Possibly Mr. Lawrence does not do full justice to the

[38] Principles of Int. Law, 3d Ed., p. 679.

points taken by the German Government as enunciated in the speech of Count Von Bülow, although he clearly indicates what he thinks the general tendency of the proposed German system of law would be. It would seem that he does not give a clear statement of the German doctrine. When he asserts that "Count Von Bülow committed himself to the crude doctrine that neutral ships plying between neutral ports would not be liable to interference," the inference is not a necessary result of the German position. Nor does it necessarily follow according to the German standard that, "to constitute the offense of carrying contraband a belligerent destination" is "essential, and therefore there" can "be no contraband when the voyage" is "from neutral port to neutral port."[39] Mr. Lawrence possibly has reference only to the position taken *arguendo* by the German Government during the correspondence immediately following the seizure of the German ships and not to the general rules formulated by the German Chancellor on January 19, 1900, in his speech before the Reichstag.[40] There is no indication that Mr. Lawrence had this speech before him when he passed judgment upon the German doctrine, although the preface to the third edition of his Principles of International Law is dated August 1, 1900.

It is possibly true that the German rules were advanced because of their expediency in view of the geographical position of Germany. But the English writer apparently admits a similar motive in opposing the proposed German system, when he says, "Great Britain is the only European state which could not obtain," in time of war, "all the supplies she wished for by land carriage from neighboring neutral ports, with which according to the doctrine in question, neutrals would be free to trade in contraband without the slightest hindrance from the other belligerent."[41]

The view taken by Mr. Lawrence would seem unfair to

[39] Principles of Int. Law, p. 679.

[40] The German argument was that according to English expression in the past, notably in 1863, and expressly in her own naval guide, there could not be contraband of war between neutral ports.

[41] Principles of Int. Law, p. 680.

the proposed rules in a number of points. Count Von Bülow clearly pointed out that belligerent vessels might capture a neutral vessel if the latter resisted the order to stop, or if irregularities were discovered in her papers, or if the presence of contraband were revealed. Under the term "contraband of war" he admitted that articles and persons suited for war might be included, provided they were at the same time destined for the use of one of the belligerents, and he was ready to admit that discovered contraband should be confiscable. It is true the caution was added that should the seizure prove to be unjustifiable the belligerent State should be bound to order immediate release and make full compensation, and that the right of visit and search should be exercised with as much consideration as possible and without undue molestation to neutral commerce. It was understood that neutral merchant vessels on the high seas or in the territorial waters of the belligerent powers should be liable to visit and search, but again with the necessary caution that the right should not be exercised in waters too remote from the seat of war, and that additional consideration be conceded to mail steamers.[42]

There would seem to be no necessary opposition between the German position in 1900 and that taken by the Supreme Court of the United States in 1863 with reference to the ships *Springbok* and *Peterhof*. In the latter case the cargo of the ship was condemned on the ground that the goods, not necessarily contraband in character, were being carried into the neutral Mexican port of Matamoras. It was believed, however, that the goods were not intended to be sold there as a matter of trade, but were destined for the use of the forces of the Southern Confederacy across the Rio Grande River. To these belligerent forces it was presumed the goods were to be conveyed as the final stage of their voyage, but the decision of the court was distinctly upon the guilt of a breach of blockade.[43] The character of

[42] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 24. Speech in Reichstag, Jan. 19, 1900.

[43] Sessional Papers, Miscl., No. 1 (1900), C. 34, p. 60.

the goods did not give just ground for seizure provided they were intended in good faith for a neutral market, but the character of the goods showed that they were not so intended, and the simulated papers of the ship substantiated this suspicion. But it is to be repeated, condemnation was declared upon the ground of an intended breach of an established blockade as the final stage of the voyage. Had there been no blockade of the Southern States these decisions could not have been upheld. No contraband of war was possible between the neutral ports in the course of *bona fide* neutral trade, but the character of the goods and the dishonest character of the ships made possible the conclusive presumption that the goods were ultimately intended for the blockaded enemy.

In the seizure of the German ships, on the other hand, the British Government was not able to show that the ships were really carrying contraband or that there was any irregularity in their papers. The protest of the German Government and its later announcement of certain rules which should govern such cases merely cautioned Great Britain against an undue exercise of the recognized right of visit and search. The attempt was not made to lay down a new system of principles which would render the carrying of contraband by neutrals unhampered by the belligerents, for Count Von Bülow in setting forth the tentative system which in the opinion of his Government would protect neutral commerce in time of war laid stress upon the fact that there are as yet no legal principles fixed and binding on all the maritime Powers, respecting the rights of neutrals to trade with a belligerent, or the rights of belligerents in respect to neutral commerce. He pointed out that, although proposals had been repeatedly made to regulate this subject all attempts had failed owing to the obstacles created by the conflicting views of the different Powers.

The Peace Conference at the Hague has in fact expressed the wish that an international conference might regulate,

on the one hand, the rights and duties of neutrals, and on the other, the question of private property at sea. The German Chancellor intimated that his Government would support any plan of the kind for more clearly defining the disputed points of maritime law. The fact was pointed out that maritime law is still in a "liquid, elastic, and imperfect state," that with many gaps which are only too frequently apt to be supplemented by armed force at critical junctures, this body of law opens the way for the criticism that "the standard of might has not as yet been superseded by the standard of right."

The Institute of International Law which met at Venice in 1896 declared that the destination of contraband goods to an enemy may be shown even when the vessel which carries them is bound to a neutral port. But it was considered necessary to add the caution that "evident and incontestable proof" must make clear the fact that the goods, contraband in character, were to be taken on from the neutral port to the enemy, as the final stage of the same commercial transaction.

This latter condition the English Government failed to fulfil in the cases of the *Bundesrath, Herzog* and *General,* and it was this failure which gave just ground for Germany's protests. Great Britain not only failed to show by "evident and incontestable proof" that the German ships carried actual contraband, but she failed to show that there were on board what have been called "analogues" of contraband. The point was emphasized indeed that while special consideration would be shown to all German mail steamers, not every steamer which "carried a bag of letters" could claim this partial immunity. The English representative said: "We understand by mail steamers, steamers of subsidized lines, and consequently owned by persons whom the German Government consider as respectable."[44] And in this intimation he merely voiced the suspicion in England that with or without the knowledge of the Government

[44] Sessional Papers, Africa, No. 1 (1900), C. 33, p. 21; Salisbury to Lascelles, Jan. 16, 1900.

the German ships had been guilty of unneutral service, which the more recent authorities on international law distinguished from the carrying of contraband.

It is generally agreed that neutral mail steamers and other vessels carrying the mails by agreement with neutral governments have in certain respects a peculiar position. Their owners and captains cannot be held responsible for the nature of the numerous communications they carry. It is equally well understood that a neutral may not transmit signals or messages for a belligerent, nor carry enemy's despatches, nor transport certain classes of persons in the service of a belligerent. But mail steamers may carry persons who pay for their passage in the usual way and come on board as ordinary passengers, even though they turn out to be officers of one or the other of the belligerents. Although the tendency of modern times to exempt mail ships from visit and search and from capture and condemnation is not an assured restriction upon belligerent interests, it is a right which neutrals are entitled to demand within certain well-defined limits. It was understood when this immunity was granted by the United States in 1862 that "simulated mails verified by forged certificates and counterfeit seals" were not to be protected.[45]

During the controversy between the English and German Governments with reference to the seizure of the three German ships, Professor T. E. Holland, the editor of the British Admiralty Manual of Prize Law of 1888, declared: "The carriage by a neutral ship of troops, or of even a few military officers, as also of enemy despatches, is an enemy service of so important a kind as to involve the confiscation of the vessel concerned, a penalty which under ordinary circumstances, is not imposed upon the carriage of contraband property so called."[46] Under this head it would seem the alleged offense of the ship *Bundesrath* may

[45] Wheaton, International Law, Dana's Ed., p. 659, note.

[46] International Law Situations, Naval War College, 1900, p. 98. Also Arguments of Lord Stowell in the case of the *Orozembo,* 6 Rob. 430; and the *Atlanta,* 6 Rob. 440.

properly be classed, and charges of a similar character were made against the ships *General* and *Herzog*. It was suspected that persons on board variously described as of a military appearance were on their way to the Transvaal to enlist. The suspicion, however, could not be proved, and the result was that the ships were released without guilt upon the charge of unneutral service or upon that of carrying contraband goods in the usual sense of the term contraband.

In connection with the attitude of Great Britain in regard to the doctrine of continuous voyages as applied to both goods and persons bound for Delagoa Bay, it is interesting to note the view expressed by a leading English authority upon international law with reference to the seizure of the ship *Gaelic* by the Japanese Government during the Chino-Japanese War. The *Gaelic,* a British mail steamer, was bound from the neutral port of San Francisco for the British port of Hongkong. Information had reached Japan that there were on board persons seeking service with the Chinese Government and carrying a certain kind of material intended to destroy Japanese ships.

Japan arrested the ship at Yokohama and had her searched. The suspected individuals, it was discovered, had escaped and taken the French mail-ship *Sidney* from Yokohama to Shanghai. Nevertheless the search was continued by the Japanese authorities in the hope of finding contraband. The British Government protested, and this protest is especially significant in view of the English contention in the cases of the German mail steamers. The protest against the further detention and search of the *Gaelic* was made on the ground that the ship did not have a hostile destination, Sagasaki, a port in Japanese territory, being the only port of call between Yokohama and Hongkong. It was shown by the Japanese that ships of the company to which the *Gaelic* belonged often called at Amoy, China, a belligerent port, but sufficient proof was not advanced to show

that there was any intention to touch there on the voyage in question.[47]

The British assertion that the neutral destination of the ship precluded the possibility of a search being made, and that it was immaterial whether anything on board had a hostile destination ulterior to that of the ship, appears rather surprising when it is seen to be almost the opposite of the position taken in the seizures of ships bound for Delagoa Bay in Portuguese territory. Japan on the other hand maintained that the proceedings were entirely correct on the ground: (1) of the probability that the *Gaelic* might call at Amoy; (2) that the doctrine of continuous voyages was applicable in connection with contraband persons or goods if they were destined for the Chinese Government even by way of Hongkong. This it will be remembered was practically the view taken by Great Britain in the German seizures, though strenuously opposed in this incident.

Professor Westlake, commenting upon the case of the *Gaelic,* states the English view of the doctrine of continuous voyages as affecting: (1) goods which are contraband of war and (2) persons who are contraband of war, or analogues of contraband. Goods, he says, may be consigned to purchasers in a neutral port, or to agents who are to offer them for sale there, and in either case what further becomes of them will depend on the consignee purchasers or on the purchasers from the agents. He contends that "such goods before arriving at the neutral port have only a neutral destination; on arriving there they are imported into the stock of the country, and if they ultimately find their way to a belligerent army or navy it will be in consequence of a new destination given them, and this notwithstanding that the neutral port may be a well-known market for the belligerent in question to seek supplies in, and that the goods may notoriously have been attracted to it by the existence of such a market."[48]

[47] Takahashi, Int. Law during the Chino-Japanese War, pp. xvii–xxvii. Note on Continuous Voyages and Contraband of War by J. Westlake; also L. Q. Rev., Vol. 15, p. 24.

[48] L. Q. Rev., Vol. 15, p. 25.

It is obvious that this was the position taken by Germany and other nations with reference to the interference with neutral commerce bound for Delagoa Bay. Professor Westlake continues in regard to the Japanese incident: "The consignors of the goods may have had an expectation that they would reach the belligerent but not an intention to that effect, for a person can form an intention only about his own acts and a belligerent destination was to be impressed on the goods, if at all, by other persons." Thus it is agreed, he says, "that the goods though of the nature of contraband of war, and the ship knowingly carrying them, *are not subject to capture during the voyage to the neutral port.*"[49]

The German Government could not have based its protest against the seizure of German mail steamers upon a stronger argument for the correctness of its position than upon this view expressing the English Government's attitude toward neutral commerce at the time of the seizure of the *Gaelic*. Professor Westlake points out, however, that goods on board a ship destined for a neutral port may be under orders from her owners to be forwarded thence to a belligerent port, army or navy, either by a further voyage of the same ship or by transshipment, or even by land carriage. He shows that such goods are to reach the belligerent "without the intervention of a new commercial transaction in pursuance of the intention formed with regard to them by the persons who are their owners during the voyage to the neutral port. Therefore even during that voyage they have a belligerent destination, although the ship which carries them may have a neutral one."[50] In such a case, he declares, by the doctrine of continuous voyages, "the goods and the knowingly guilty ship are capturable during that voyage." In a word, "goods are contraband of war when an enemy destination is combined with the necessary character of the goods." And it is pointed out

[49] L. Q. R., Vol. 15, p. 25. Italics our own.
[50] *Ibid.*, p. 25.

that "the offense of carrying contraband of war" in view of the doctrine of continuous voyages is committed by a ship "which is knowingly engaged in any part of the carriage of the goods to their belligerent destination."[51]

It is shown that even if the doctrine of continuous voyages is denied as having any validity, it may still be held that "the goods and the knowingly guilty ship are liable before reaching the neutral port if that port is only to be a port of call, the ultimate destination of the ship as well as of the goods being a belligerent one."[52] But if the doctrine of continuous voyages is denied it may also be questioned "that a further intended carriage by transshipment or by land can be united with the voyage to the neutral port so as to form one carriage to a belligerent destination, and make the goods and the knowingly guilty ship liable during the first part" of the voyage.[53] In other words, a belligerent destination both of the goods and of the ship carrying them would be required.

In regard to the doctrine of continuous voyages as applied to persons, Professor Westlake says, in speaking of the *Gaelic,* "When a person whose character would stamp him as contraband, or an analogue of contraband, is a passenger on board a ship bound for a neutral port, and having no ulterior destination, but intends on arriving there to proceed to a belligerent port, there is no closer connection between the two parts of his journey than that he should hold a through ticket to the belligerent port." It is pointed out that the distinction between a person when considered as contraband and goods or despatches is that "the person cannot be forwarded like a thing." Thus in the case of a person holding a through ticket, the ticket is merely a facility, but it must depend upon the person whether he will use it, and consequently, where the passenger is booked only to a neutral port, he "cannot *constructively* be considered as *bound for a belligerent destination* until he is *actually bound for one.*"[54]

[51] L. Q. R., Vol. 15, p. 26.
[52] *Ibid.,* p. 26.
[53] *Ibid.,* p. 26.
[54] *Ibid.,* p. 29. Italics our own.

Upon Professor Westlake's reasoning the whole contention of the English Government in arresting passengers upon German mail steamers bound for Delagoa Bay falls to the ground, for he continues: "There must for such a destination be a determination of his own which during the *first part of his journey* inevitably remains *contingent* and which is therefore analogous to the new determination which may be given in the neutral port as to the employment of goods which have found a market there." Consequently he says: "The doctrine of continuous voyages cannot be applied to the carriage of persons. . . . A neutral destination of the ship is conclusive in the case of passengers taken on board in the regular course."[55] Accordingly, Professor Westlake reaches the conclusion that the search of the *Gaelic* was unjustifiable under the right of belligerents against neutrals on the high seas.[56]

The application which Great Britain attempted to make of the doctrine of continuous voyages proved unsuccessful both with reference to contraband for neutral ports and the carrying of analogues of contraband by German mail steamers bound for Delagoa Bay. In the end the British Government paid to the German East African Line owning the *Bundesrath, Herzog* and *General,* £20,000 sterling, together with an additional sum of £5,000 as compensation to the consignees. For the detention of the ship *Hans Wagner,* a German sailing boat which had been arrested on February 6, 1900, the sum of £4,437 sterling was paid. The allegation in this case was that of carrying contraband, but the ship was finally released without the cargo being examined, a fact which indicates that in this, the last of the German vessels to be seized, Great Britain realized the futility of attempting to interfere with commerce between neutral ports.

The recommendations for the adjustment of the difficulty in the several cases were made by a commission of five members, two of whom were Germans, and the awards gave

[55] L. Q. R., p. 32.

[56] He hold, however, that the search was justifiable as an exercise of the police power of Japan within her own territorial waters.

general satisfaction in Germany. The East African Line congratulated Count Von Bülow upon the energetic manner in which he had handled the incidents. German commercial interests considered that they might count upon the effective support of the Government, and that the result was a complete justification of the attitude which Germany had assumed with regard to the conflicting interests of belligerents and neutrals.

CHAPTER IV.

Trading with the Enemy.

Almost contemporaneously with the German-English controversy with reference to the restrictions which might legitimately be put upon German mail steamers Great Britain and the United States became involved in a lengthy correspondence.

Various articles of the general nature of foodstuffs were seized upon ships plying between New York and Delagoa Bay. It developed later that the seizures were justified by England not upon the ground of the guilt of carrying contraband *per se,* but because an English municipal regulation was alleged to have been violated by English subjects in that they had traded with the enemy. But the fact was incontrovertible that the port of destination as well as that of departure was neutral. The burden of proof under the circumstances rested upon the captor to show that goods innocent in themselves were really intended for the enemy. Consequently the line of justification which was set up involved not merely an extension of the doctrine of continuous voyages, but an application of this much mooted theory that would show an ultimate intention to trade with the enemy.

The offense of trading with the enemy is not a new one in international law. In 1799 Sir William Scott, afterwards Lord Stowell, sitting upon the case of the *Hoop,* which is perhaps the leading case upon the subject, declared that all trading with the enemy by the subjects of one State without the permission of the sovereign is interdicted in time of war.[1] It was pointed out that, according to the law of Holland, of France, of Spain and as a matter of fact of all the States of Europe, "when one state is at war with

[1] 1 C. Rob. 200.

another, all the subjects of the one are considered to be at war with all the subjects of the other and all intercourse and trade with the enemy is forbidden." This principle has been accepted in the United States as one of the conditions of warfare. Wheaton declares: "One of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the license of their respective Governments."[2]

In England a declaration of war is equal to an Act of Parliament prohibiting all intercourse with the enemy except by the license of the Crown. The penalty of such illegal intercourse is the confiscation of the cargo and of the ship engaged in such trade. The instructions are emphatic upon the point: "The commander should detain any British vessel which he may meet with trading with the enemy unless, either: (1) He is satisfied that the master was pursuing such trade in ignorance that war had broken out, or, (2) The vessel is pursuing such trade under a license from the British Government."[3]

When a vessel is bound for a belligerent port it appears that the burden of proof is thrown upon the ship's captain to show that goods so shipped are not intended for the enemy. In the case of the *Jonge Pieter* (1801) goods purchased in England were shipped for an enemy port but were seized by a British cruiser under the right of a belligerent. It was attempted to be set up that the goods belonged to citizens of the United States, but in the absence of documentary proof condemnation was decreed on the ground of hostile ownership.[4]

The decisions in these cases as well as the general opinion of the past had shown what the British view was, namely,

[2] Elements of International Law, Dana Ed. (1866), § 309 et seq.
[3] British Admiralty Manual of Naval Prize Law (1888), § 38.
[4] 4 C. Rob. 79; other cases bearing upon the subject are: the *Samuel* (1802), 4 C. Rob. 284 N; the *Nayade* (1802), 4 C. Rob. 251; the *Franklin* (1805), 6 C. Rob. 127; see also Kent's Commentaries, Vol. I, p. 87; Halleck, International Law (1878), Vol. II, p. 130; Moore, Digest of Int. Law, Vol. VII, p. 534; White, L. Q. Rev., Vol. 16, p. 407.

that all trading with the enemy is absolutely forbidden to British subjects upon the outbreak of war. But in the controversy between the English Government and that of the United States with reference to foodstuffs bound for Delagoa Bay on board English ships the argument set up by the British authorities was not generally considered well founded, since little more than suspicion was produced as evidence to show that any of the ships really intended to trade with the enemy. There was no dissent from the established rule that trading with the enemy on the part of the subjects of the belligerent States is prohibited. But those nations whose citizens or subjects suffered loss by the enforcement of the English law were not satisfied that the English ordinance had been violated either in deed or by intent.

Soon after war had begun it was known that the English authorities would scrutinize closely any transactions of British ships, or of ships leased by English firms, which had dealings in a commercial way with the warring Republics. On November 24 the Official Imperial Gazette of Berlin had published the following note: "According to official information British subjects are forbidden by English law to have any trade or intercourse with the South African Republic and the Orange Free State, or with the subjects of these two states, within their territories, during the continuance of the present state of war."[5] Because of this prohibition, it was pointed out, all goods sent by English ships and intended for the South African Republic or the Orange Free State and ships of war, even in cases where the goods were not contraband of war, might be legally detained by the British authorities. Attention was called to the fact that this measure might also be applied to goods destined for ports in the neighborhood of the seat of war and not belonging to Great Britain. German commercial circles were warned that they should consider whether under the circumstances it was not to their interest to avoid using

[5] London Times, Nov. 24, 1899, p. 7, col. 4.

British ships for transporting goods to South Africa during the war.

Notwithstanding this announcement, toward the close of December the British Foreign Office stated that information had reached the Secretary of State for Foreign Affairs which showed that it was not generally known that trading with the enemy was unlawful. The English view of the restrictions upon British subjects was thus pointed out: "British subjects may not in any way aid, abet, or assist the South African Republic or the Orange Free State in the prosecution of hostilities, nor carry on any trade with, nor supply any goods, wares or merchandise to either of those Republics or to any person resident therein, nor supply any goods, wares, or merchandise to any person for transmission to either Republic, or to any person resident there, nor carry any goods or wares destined for either of the Republics or for any person resident therein."[6] It was further declared that these restrictions applied to all foreigners while they were on British territory, and that all persons, whether British subjects or foreigners, who might commit any of the prohibited acts would be liable to such penalty as the law provided.

These municipal restrictions obviously made illegal on the part of English subjects and of strangers temporarily resident upon British soil all commercial acts, from one country to the other, all buying and selling of merchandise, contracts for transportation, as well as all operations of exchange, or the carrying out of any contract which would be to the advantage of the enemy. A time-honored English maxim declares: "*Est prohibitum habere commercium cum inimicis.*"

When Great Britain attempted to enforce these recognized prohibitions against trading with the enemy it was found difficult to show that the suspected ships had in reality had dealings with the public enemy or with its

[6] British and Foreign State Papers, vol. 92, p. 383. Notice . . . warning British Subjects against trading with the enemy, London, December 22, 1899.

agents. The ships were not bound for a hostile port nor for a blockaded one, but for a neutral harbor which was not even contiguous to either the Transvaal or Orange Free State. Other Governments, although ready to admit that it was competent for England to forbid her own subjects to trade with the enemy, were not willing to allow their respective subjects to suffer the loss of goods which had been shipped in good faith. The character of the goods apparently excluded the idea of contraband of war, and the ships themselves, since they were bound from neutral ports to a neutral port, appeared to be acting in good faith.

THE SEIZURES. MARIA, MASHONA, BEATRICE, AND SABINE.

THE MARIA.—As early as September 6, 1899, the *Maria*, a Dutch ship, had touched at Cape Town on her way to Delagoa Bay with a cargo consisting largely of flour, canned meats and oats shipped from New York.[7] She was allowed to proceed after a short detention by the British authorities although goods in her cargo were plainly marked for the Transvaal. It was realized under the circumstances that there was no ground for the detention of ship or cargo, and in view of the fact that no war was in progress at the time, the detention of the vessel even for a short period would appear to have been unjustifiable. The *Maria* called at Port Elizabeth, whence she cleared for Delagoa Bay. On October 29 she put in for coal at Durban, three hundred miles from Lorenzo Marques, and was boarded by the commander of the English ship *Tartar*. The *Maria's* captain was willing to be visited and searched without protest. According to the official report, "no guard was placed on her," and "the agents were willing to land all the contraband."[8] The commander of the *Tartar* informed them that if this were submitted to the vessel need no longer be detained. When the *Maria* had been brought in and no contraband was discovered by the search, the agents of the

[7] For. Rel., 1900, p. 529.
[8] For. Rel., 1900, p. 575.

ship protested against the landing of that portion of the cargo consisting of flour and other goods which they considered innocent, but spoke of the vessel, it was alleged, as belonging to a British company called the "American-African Line." The commander of the English cruiser pointed out to them that British subjects could not under the Governor's proclamation trade with the enemy, and mentioned the warning in a local customs notice as the penalty for "vessels which carried contraband of war or goods of whatever nature the real destination of which was the enemy or their agents in neutral ports."[9]

The *Maria's* cargo included a consignment of lubricating oil as well as a miscellaneous consignment of light hardware. Part of the cargo was seized and part merely "detained." The consignment to the Netherlands South African Railway, a thousand cases of lubricating oil, eighty-four cases of picks, twenty cases of handles, was seized as enemy's property, since there was sufficient evidence, it was thought, to show that these goods belonged to the railway company, the consignees, and not to the New York shippers, the consignors. This opinion was held on the ground that the Netherlands South African Railway was owned by the South African Republic.

All of the Delagoa Bay cargo including the flour and other foodstuffs was landed and the *Maria* put to sea. But on November 3 the authorities at Durban were instructed by the British Foreign Office that foodstuffs were not to be treated as contraband, and the captain of the British cruiser *Philomel* warned the customs that the flour should no longer be detained. It was released and measures were at once taken for reshipping it on the British steamer *Matabele,* when it seems for the first time to have occurred to the customs authorities that the flour might thus find its way to Pretoria by means of an English ship. According to the official report: "It was then provisionally detained again. But on it being found that the flour was *bona fide*

[9] For. Rel., 1900, p. 575.

a part of the *Maria's* cargo the agents and all parties concerned were told that no further restrictions would be placed on the shipment, but it was at the same time pointed out that the flour was going direct to the enemy. The Governor's proclamation against trading with the enemy was then studied in connection with the above-mentioned permission, with the result that agents, shippers, and shipowners all refused to ship or carry the flour and nobody would have anything to do with it," although no objection was made by the naval authorities to the cargo being forwarded to its destination.[10]

For the detention of the *Maria* her owners, upon the protest of the Netherlands Government, were awarded £126 sterling as indemnity. The consignment of flour "detained" at Durban was purchased by the English Government at the price it would have brought at Delagoa Bay on November 2, the day on which it would presumably have reached there had no interruption occurred.[11]

It was pointed out in the report upon the case that the *Maria* was undoubtedly a Dutch ship and that her agents had introduced an element of confusion in the dealings with her by speaking of her as belonging to a British company. It was therefore admitted that possibly some of the goods were removed on the erroneous supposition that she was a British ship and could not lawfully carry them. Had she been a Dutch ship leased by a British firm her liability would appear to have been as great as if she had been a vessel owned by British subjects. Had she belonged to a British company she would have been a British ship, and it would have been unlawful for her to carry for the enemy.

The Mashona.—On December 5, 1899, the *Mashona,* clearing from New York for Delagoa Bay, was seized by the British cruiser *Partridge* near Port Elizabeth, seven hundred and fifty miles from Lorenzo Marques, and taken into

[10] For. Rel., 1900, p. 575.
[11] For. Rel., 1900, p. 610.

Table Bay, but later to Cape Town as prize on the charge of trading with the enemy. Consul-General Stowe reported the capture, and informed the Department at Washington that the *Mashona* carried five thousand tons of general cargo, including seventeen thousand bags of flour for the Transvaal by way of Delagoa Bay. Foreseeing the probability that the *Mashona* would be brought into Cape Town as prize, Mr. Stowe inquired: "Is foodstuff such as flour, contraband? Being a British ship has the British Government a right to seize?"[12]

Counsel for the original American shippers upon the *Mashona* stated that the cargo was of the character of general merchandise and was destined "for neutral citizens domiciled in neutral territory." It was pointed out in the prayer of the owners of this portion of the cargo that while the British Government might be justified in seizing her own vessels, it appeared that the British naval authorities were illegally jeopardizing the property of American citizens in that the vessel seized was "under contract to deliver to the persons named in the invoices the merchandise therein specified, none of which is contraband of war."[13]

One portion of another shipment was on account of a Delagoa Bay firm, the other on account of a London one. With reference to the goods consigned to the latter firm the American shippers were unable to say what their ultimate destination might be, but in regard to the shipment to Delagoa Bay they were positive that the consignees were a firm doing a large local business in Lorenzo Marques. To the best of their knowledge it was a German firm whose members were not citizens either of the Transvaal or of the Orange Free State. They showed that the goods were sold on four months' time dating from November 3, and consequently that their loss would fall upon the original shippers, who were citizens of the United States. The fact was pointed out that additional merchandise amounting to

[12] For. Rel., 1900, p. 529; Stone to Cridler, Dec. 6, 1899.
[13] For. Rel., 1900, p. 530; Hopkins and Hopkins to Hay, Dec. 12, 1899.

five thousand dollars had been purchased for the Delagoa Bay firm, with a view to immediate shipment, but would have to be held up and probably lost because of a situation which amounted to a blockade declared by Great Britain over a neutral port, an act which in the end would compel all firms in Lorenzo Marques to cease buying American goods.[14]

It was alleged by the captors that the ship's papers were not in proper form, and that besides the flour and other foodstuffs she carried a consignment of lubricating oil for the Netherlands South African Railway. This consignment was held to be enemy's property since it was considered that the railway belonged to the Transvaal, the specific charge against the ship being that of trading with the enemy. The fact that a consignment of flour was billed to a Lorenzo Marques firm but labelled "Z. A. R." created a conclusive presumption, it was thought, that the flour was intended for the Transvaal, although its owners claimed that the consignment was not destined for the belligerent Republic but for local consumption at Lorenzo Marques.[15]

Both the cargo consigned to the Transvaal and the vessel herself were claimed as lawful prize. The cargo, it was contended, was unprotected since it was enemy's property, and the vessel, by trading with the enemy, had violated a regulation which rendered it confiscable. Against this it was urged that the consignees were hostile only by reason of domicile, and that neither the owners of the ship nor the captain had any intention to trade with the enemy. So far as intention was concerned, it was shown that the captain had intended to pass a bond at Algoa Bay, one of the ports of call, undertaking not to deliver the goods at Delagoa Bav without the permission of the proper authorities. The three judges of the Supreme Court of Cape Colony sitting as a prize court came to different conclusions. The Chief Jus-

[14] For. Rel., 1900, pp. 530–533; Flint Eddy and Co. to Hopkins and Hopkins, Dec. 9, 1899, and Hopkins and Hopkins to Adee, Dec. 15, 1899.

[15] For. Rel., 1900, pp. 538–539, 561.

tice held that the cargo should be condemned but not the ship. One opinion was that neither ship nor cargo should be condemned; the third that both ship and cargo should be condemned. There were thus two justices to one for condemning the cargo and two to one against the condemnation of the ship. The cargo was consequently condemned and the ship released.[16]

Different views were also held by the judges with reference to the condemnation of the goods aboard the *Mashona.* The Chief Justice held that the intention of the captain to alter the destination of the goods was sufficiently established to prevent their condemnation. The other justices dissented on this point. They held that the goods should be regarded in prize law as the property of residents of the Transvaal, and that such ownership did not seem possible of denial. In their opinion there was sufficient reason for condemning the goods since they were enemy's property captured on the high sea in a non-neutral ship.

This view obviously implied that an enemy character was impressed upon persons resident in the Transvaal not by nationality but merely by domicile. England's proclamation had in fact forbidden trade with the enemy or with those resident upon enemy territory. In other words, those residing in hostile territory were regarded as enemies when there was a question of trading with the enemy. The same principle was applied when there was a question of property in goods which were on their way to the enemy's territory, a view which would seem reasonable since even the *de facto* Government of a hostile region could possess itself of goods which had been allowed to enter its territory.

With regard to the question of condemning the ship the Chief Justice held that there was not sufficient evidence to warrant confiscation. He cited the case of the *Hook,*[17] which was condemned in 1801, but held that the case of the *Mashona* was not on all fours with the conditions of

[16] Decision at Cape Town, March 13, 1900, reported in Cape Times, March 14, 1900.

[17] 1 C. Rob., p. 200; Moore, Digest of Int. Law, Vol. VII, p. 534.

that decision. He took the view that the case of the *Mashona* was more nearly analogous to the cases of the *Minna* and the *Mercurius,*[18] and consequently declared for the restoration of the ship.

One justice concurred on the main point at issue, namely, that there appeared to be "sufficient proof in the present case of an honest intention to pass a bond at Algoa Bay not to take the goods to Delagoa Bay except with the permission of the proper authorities. . . . The presumption of an intention of trading with the enemy, arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for the restitution of the ship must consequently be allowed."[19]

One justice dissented from this opinion and argued that "as soon as war broke out, it became the duty of the master to decline to convey any goods which, from the papers in his possession, appeared to be the property of enemy consignees." It was contended by this justice that "his contract of affreightment could not be fulfilled" in any event, and he should have been aware of this fact. Further, it was urged that there was not convincing evidence to "establish that there was no intention on the part of the master of the ship to trade with the enemy, except with the permission of the proper authorities. In the circumstances, such a defense must be established by very clear proof; . . . although there is no reason whatever to impute any disloyal intention, or *mala fides,* . . . the proof of non-liability on

[18] The *Minna* (Edwards 55, n.; Roscoe, English Prize Cases (1905), p. 17, note) was restored by Sir William Scott in 1807 on the ground that her voyage was *contingent* not *continuous.* The ship had been captured on a voyage from Bordeaux, destined ultimately to Bremen, but with orders to touch at a British port and to resume her voyage if permitted. The *Mercurius* (Edwards 53; Roscoe English Prize Cases (1905), p. 15) was restored by the same judge in 1808 on the ground of an "*honest intention*" to procure a license before trading with the enemy.

[19] Decision at Cape Town, March 13, 1900, Chief Justice, Mr. Justice Buchanan concurring.

this ground has not been made out." On the contrary, it was insisted, in this dissent from the leading opinion, "there seems to be an absence of proof that it was not the intention . . . to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that [the master] intended to apply for and obtain a license before engaging in intercourse which, in the absence of the license, was of an unlawful character. From the moment this ship left New York harbour . . . she was liable *stricto jure* . . . to seizure and condemnation; as she was still without a license when seized, *stricto jure* the liability remains."[20]

The fate, however, of the ship itself was of interest to third parties only in so far as its disposition involved the rights of neutrals whose goods were on board. Great Britain's action in seizing her own ships, or ships chartered by her own subjects, had the effect of placing a virtual blockade upon a neutral port, for few but English ships carried for the Transvaal or Orange Free State, a fact which bore with especial hardship upon American shippers. The "detention" of all Delagoa Bay cargoes in British bottoms, provided a few articles were found consigned to the Transvaal, was a practice which was indignantly protested against by all neutral shippers upon English vessels. The injustice which this practice worked was forcefully brought home to the United States by an apparent disregard of the property rights of innocent neutrals in the seizure of two other ships at about the same time as that of the *Mashona*.

The Beatrice.—This ship, also clearing from New York, was reported in December, 1899, to have been compelled by the English naval authorities to discharge all of her Delagoa Bay cargo into lighters at East London, some six hundred miles distant from Lorenzo Marques. It was pointed out by the New York shippers in their protest addressed to Secretary Hay at Washington that, according to the terms of

[20] Decision, March 13, 1900; Mr. Justice Lawrence dissenting.

the American and African bill of lading, the steamship line was thus relieved of any further responsibility, since the goods were at the risk and expense of the consignees after leaving the ship's side.[21]

The shipments had been made, many of them on regular monthly orders, to Portuguese and other firms in Lorenzo Marques. The policy of insurance did not cover war risks, and the company holding the insurance declared that it was not responsible for any accident which might occur while the merchandise was lying in lighters or hulks at a port of discharge which had been forced upon the ship by the English authorities.[22] That portion of the cargo of the *Beatrice* which was shipped from New York consisted of large consignments of flour, canned goods, and other foodstuffs, but included also a consignment of lubricating oil as well as a miscellaneous assortment of light hardware, but none of the articles shipped were of a contraband character in the usual meaning of that term. Part of the flour was branded Goldfields and part was labelled Johannesburg, although the whole consignment was marked Delagoa Bay. The American shippers averred that although they regularly sold flour to merchants engaged in trade in various parts of South Africa they "had never sold flour with direct or ulterior destination to the South African Republic, by re-sale or otherwise." They made affidavit that all of their sales had been made for the ordinary uses of life, and that "since the war had broken out they had made no sales of flour to merchants or others in the South African Republic."[23]

The reason assigned in the official report of the English

[21] For. Rel., 1900, p. 533, Norton and Son to Geldart, Dec. 14, 1899.
[22] According to the terms of sale, on time, the shippers pointed out the obvious fact that unless the goods were delivered, the Delagoa Bay consignees as well as others would refuse to honor the drafts drawn upon them for the amount of the purchase. Consequently the loss would fall upon the American shippers should Great Britain persist in turning aside innocent consignments from their neutral port of destination.
[23] For. Rel., 1900, p. 565; Choate to Salisbury, Jan. 13, 1900.

authorities for their action in regard to the *Beatrice* was that she "contained large quantities of goods, principally flour, destined for the South African Republic, which the customs authorities at East London required should be landed at that port." Since the cargo was stowed in such a manner as to make it impossible to land goods destined for the Republic without also discharging goods intended for Portuguese East Africa, it was alleged that the master and agents of the ship preferred to land the whole of the cargo at East London, where it was stowed by the customs. But it was admitted that the removal of large quantities of the goods so landed had been permitted from time to time "for the purposes of local and *bona fide* Portuguese consumption." The consignment to the Netherlands South African Railway was held to be enemy's property since it was considered that the railway was owned by the Republic. The specific reason assigned for the arrest of the steamer was "that the *Beatrice* being a British ship, was by carrying goods destined for the enemy's territory, illegally engaged in trade with the enemy in contravention of Her Majesty's proclamation of December 27, 1899."[24] The vessel sailed for Calcutta in ballast on December 11, 1900.

The Sabine.—On February 22 the last of the ships clearing from New York for South African ports was reported to have been seized at Port Elizabeth, seven hundred and fifty miles from Lorenzo Marques. The *Sabine* was also a British ship with Mossel Bay, Algoa Bay, and Durban among her ports of call, and carried shipments aggregating thirty to forty thousand dollars in value made by New York merchants to these ports, all of which are in British territory. But in addition to the allegation which had been brought against the *Maria, Mashona,* and *Beatrice,* of trading with the enemy, it was suspected that the *Sabine* was carrying actual contraband of war. The latter suspicion, however,

[24] For. Rel., 1900, p. 574; Salisbury per Bertie to Choate, Jan. 26, 1900. This proclamation was not retroactive in the sense that it established a new prohibition, but was merely explanatory of an accepted restriction upon trade with the enemy by British subjects. Supra, p. 116.

was not pressed, although the authorities who stopped and examined the ship upon the specific charge of violating a municipal law asserted that the *Sabine's* "papers were not in proper form and that goods were found on board which, though shipped to ports this side were marked to persons residing in Boer territory." The case was viewed by the English Government "as a very suspicious one under municipal law, but, as the evidence was not very complete, they gave the vessel the benefit of the doubt."[25] After a short detention both ship and cargo were released.

The news of the reported seizures aroused considerable popular feeling in the United States. In the Senate a resolution was introduced which, as finally amended, read: "Whereas it is alleged that property of citizens of the United States not contraband of war has been lately seized by the military authorities of Great Britain in and near Delagoa Bay, South Africa, without good reason for the same, and contrary to the accepted principles of international law; and, Whereas it is alleged that property of citizens of the United States is now unjustly detained by the military authorities of Great Britain, in disregard of the rights of the owners of the same; therefore, Resolved by the Senate of the United States, That the President is hereby requested to send to the Senate, if not, in his opinion incompatible with the public interests, all information in possession of the State Department relating to the said alleged seizure and detention, and also to inform the Senate what steps have been taken in requesting the restoration of property taken and detained as aforesaid."[26]

The final clause of the resolution as at first introduced was stricken out after a discussion as to whether the Secretary of State should be *"directed"* or the President be *"requested"* to furnish the desired information. It was realized that the language of the expunged clause, "and whether or not the Department has informed the proper British au-

[25] For. Rel., 1900, pp. 594–595.

[26] 56 Cong., 1 Sess., Jan. 17, 1900, Record, Vol. 33, Pt. 1, pp. 895, 900.

thorities that, if said detention is persisted in, such act will be considered as without warrant and offensive to the Government and people of the United States," was neither diplomatic in its tone nor warranted by the circumstances. Amicable negotiations were still in progress, and those negotiations were concerned with a discussion of the very question which would thus have been decided in the affirmative by the Senate, namely, that the seizures had been contrary to the principles of international law. Consequently the resolution only declared that it was "alleged" that Great Britain had departed from the strict principles of international law, and it was not intimated that her persistence in such acts would probably require a resort to more forcible measures than mere protest on the part of the United States.

A motion had been made that the resolution be referred to the Committee on Foreign Relations, where it was hoped by certain members of the Senate that it would die a natural death, an end which would have been deserved under the circumstances, since the event to which the resolution referred was then in the course of diplomatic consideration and nothing had indicated that the State Department would not be able to secure protection for the interests of all citizens of the United States as neutrals during a recognized belligerent contest. An unsettled question of international law was at issue between Great Britain and the United States, and was being dealt with as fast as official information reached the British Foreign Office from the scene of the occurrences which were alleged to have been in contravention of established principles. Flour or any other foodstuff might or might not be contraband of war according to the particular circumstances of the case. As a general rule products like flour shipped from a neutral State are not contraband, but it is always a question of fact whether the immediate destination of such flour is for hostile purposes, namely, the sustenance of a belligerent army. If flour or foodstuffs generally were so destined they became contraband of war for the particular case.

Not less than twenty thousand barrels of flour had been shipped by citizens of the United States upon the three steamers, *Maria, Mashona,* and *Beatrice,* and the proposer of the resolution insisted that the Senate was entitled to know in what manner the rights of the United States were being asserted in view of the obvious hardship which *bona fide* neutral shippers had thus suffered. He urged that the seizure of property of citizens of the United States by one of the belligerents was "a thing which profoundly affects the American people; it affects every corn grower, every wheat farmer, the owner of the cattle upon a thousand hills, the mill man, the middleman, everybody who is interested in producing and exporting the products of the farm and the field is interested in this question and is entitled to know what has been done in this case."[27]

It is to be hoped that the Senator's constituents read this speech in the next morning's papers, for otherwise it must go down in history as a burst of eloquence wasted upon unhearing ears. Had he been able to pass his resolution so worded as to *"direct"* the Secretary of State to throw open the entire files of the Department's foreign correspondence for the Senate's inspection, instead of merely *"requesting"* the President to furnish such information as the Senate desired "if not, in his opinion, incompatible with the public interest," the result would have been practically the same. In either event the President would have controlled the situation, since he can not be compelled to furnish information to the Senate when he considers it incompatible with the public interest to do so. The only power possible to be exercised by the Senate over the Executive in such a case is that of impeachment. And should impeachment be possible or advisable the process could be carried through as well with the words, "if not, in his opinion, incompatible with the public interest," *out* of a resolution as with those words *in* such a formal request of the Senate.[28]

[27] Hale of Maine, 56 Cong., 1 Sess., Rec.. Vol. 33, Pt. 1, p. 896.
[28] Teller of Colorado, 56 Cong., 1 Sess., Record, Vol. 33, Pt. 1, p. 898.

As a rule it is unwise for the Senate to interfere while negotiations are pending between the Executive Department and foreign Governments over any question which is at issue. Should a resolution *"requesting"* information upon any subject be deemed necessary, it should obviously be addressed to the President and, merely for the sake of courtesy, with the usual *caveat.* It should not be "directed" to the Secretary of State, for that official stands in a different relation to the legislative department from that of the secretaries of any of the other departments. The Secretary of State is not required by law to report to Congress as are all the other Cabinet officers. He has been exempted from that requirement for the reason that his duties are mainly diplomatic. Negotiations carried on with foreign Governments upon matters of a delicate character might involve serious embarrassments if during their pendency the successive steps were reported to Congress.[29] The power of the President in consultation with the Secretary of State to deal with foreign Governments at least up to the last moment and final consent of the Senate has made it possible for the United States to preserve a fairly uniform foreign policy. For despite the repeated changes of administration and of domestic policies the general foreign policy has been closely modeled upon the expedient course of absolute neutrality laid down by Washington. Were it a practical requirement of the Constitution that all foreign correspondence upon any important question should be at once laid before the Senate, it is reasonable to suppose that few treaties or important conventions would finally be ratified. In a question of international law such as that under discussion between the Governments of Great Britain and the United States, it would have been extremely unwise during the negotiations for the Senate to interfere in any way with the regular course of diplomatic intercourse between the two Governments.

[29] Platt of Connecticut, 56 Cong., 1 Sess., Record, Vol. 33, Pt. 1, p. 899.

In the end the Hale Resolution was agreed to, but nothing came of it, for the State Department found the English Government not unwilling to make an equitable settlement for the losses which citizens of the United States had incurred as a result of the seizures of British ships carrying American goods from New York to Delagoa Bay.

The Legality of the Seizures.

While the fruitless discussion had been in progress in the Senate Secretary Hay had been dealing with the question in such a manner as to safeguard all American interests, but at the same time with a full consideration of the necessity for protesting against any undue extension of belligerent rights. Immediately following the seizure of the British ships clearing from New York with American goods on board he had requested a prompt explanation. In his instructions to Ambassador Choate he said: "You will bring the matter to the attention of the British Government and inquire as to the circumstances and legality of the seizures."[30] And later, Mr. Choate was further instructed to ascertain "the grounds in law and fact" upon which the interference with apparently innocent commerce between neutral ports was made, and to demand "prompt restitution of the goods to the American owners if the vessels were seized on account of a violation of the laws of Great Britain, as for trading with the enemy; but if the seizure was on account of the flour . . . the United States Government can not recognize its validity under any belligerent right of capture of provisions and other goods shipped by American citizens to a neutral port."[31] Mr. Hay pointed out the fact that the American shippers had produced evidence intended to show that the goods were not contraband in character, and should this prove to be true prompt action was to be requested on the part of Great Britain in order to minimize as far as possible the damage to neutral goods.

[30] For. Rel., 1900, p. 534; Hay to Choate, Dec. 21, 1900.
[31] For. Rel., 1900, pp. 539–540; Hay to Choate, Jan. 2, 1900.

The position taken by the English Government was indicated on January 10 in a note handed to Mr. Choate: "Our view is that foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used. It must be shown that this was in fact their destination at the time of their seizure."[32] Lord Salisbury verbally added that the British Government did not claim that any of the American goods were actual contraband, but that the ships had been seized on a charge of trading with the enemy, and it was intimated also that "an ultimate destination to the citizens of the Transvaal, even of goods consigned to British ports on the way thither, might, if the transportation were viewed as one continuous voyage, be held to constitute in a British vessel such a trading with the enemy as to bring the vessel within the provisions of the municipal law."[33] He asserted that the offense was cognizable by a prize court alone, but admitted that "if the owners of the cargoes, being neutrals, claim that they are innocent, the cargoes should not be condemned with the ship but should be delivered over to them."[34] He suggested that the ordinary course would be that the owners should claim the cargoes in the prize court, where the cases would be considered and properly dealt with on their merits.[35] The owners would be requested, he said, to prove that they were the *bona fide* owners by submitting bills of lading and invoices to the court. It was intimated that the American flour which had been removed from the ships was not detained in any way but was perfectly open to the owners to make whatever arrangements they pleased for its immediate removal. If they considered themselves aggrieved by the

[32] For. Rel., 1900, p. 549; Salisbury per Choate to Hay.
[33] For. Rel., 1900, p. 609; Hay to White, March 20, 1900, citing Choate's despatch of April 26, 1900.
[34] For. Rel., 1900, p. 549.
[35] See Story, Manual of Naval Prize Law (1854), pp. 46–71, where the practice in such cases before prize courts is stated; in other portions of the work the claims made by innocent or interested parties are considered.

action of the English authorities in causing the flour to be landed it was of course open to them to take such proceedings against the persons concerned as they were advised might be appropriate under the circumstances.[36]

Mr. Choate at once retorted that in such a case the United States would very probably send the bill to the British Government. The fact was pointed out that the operation of the English law did not lessen the obligation incumbent upon Great Britain to restore the goods to their *bona fide* neutral owners or to the neutral consignees. Although the permission had been given to the owners to come and take their goods at the ports of detention, short of the original port of destination, this permission could not be considered as discharging the obligation to restore the goods. The representative of the United States insisted that nothing short of delivery at their port of consignment would fulfill the English obligation in a commercial sense such as to give the goods the value intended. It was clearly shown that under the application of the English municipal law the goods in question became as inaccessible to their owners for all the purposes of their commercial adventure "as if they had been landed on a rock in mid-ocean."[37] In his criticism of the English position, Mr. Choate said: "The discharge from the vessel and landing short of the port of destination and failure to deliver at that port, constitute wrongful acts as against all owners of innocent cargoes."[38] And he pointed out the inconsistency of the position since it was not claimed that any but British subjects could be guilty of any violation of the English prohibition against trading with the enemy. He was accordingly instructed to insist that the obligation rested upon the British Government to indemnify the neutral owners and make good to them all damages and loss sustained by the treatment to which they had been subjected.

[36] For. Rel., 1900, p. 549, Salisbury, speaking with special reference to the *Mashona* and *Maria;* Choate to Hay, Jan. 10, 1899.
[37] For Rel., 1900, p. 585; Choate to Salisbury, Feb. 6, 1900.
[38] For. Rel., 1900, p. 586.

The United States was ready to admit that there might have been cause for the seizure and detention for the purpose of examination before a prize court upon the suspicion of trading with the enemy. But the decision of the judges seemed to indicate that such a suspicion was not founded upon facts which could be produced before the courts. The vessels were released upon the ground that they had not in fact traded with the enemy nor intended to do so except with the express or implied permission of the British Government. In view of the causes put forward for the seizures and of the reasons stated by the authorities for the subsequent release of the ships it would seem that the cargoes, "except in so far as contraband might have been involved would have the same status as though found aboard British ships trading between neutral ports where there was no question of a belligerent in the neighborhood of the port of detention."[39] The prize court *did* decide that there was no question of contraband involved, and the American representative pointed out the fact that the seizures not having been made or justified on account of contraband goods, the only effect of the British decision would seem to be either that Great Britain possessed the right to seize neutral and non-contraband goods aboard British vessels trading between neutral ports, or else the American owners of such cargoes would be entitled to full compensation for their damages.

Lord Salisbury in his reply attempted to correct what he considered the misapprehension which underlay the statement of alternatives, namely, that neutral and non-contraband goods were not free in British bottoms between neutral ports, or else full compensation must be made to the owners for their seizure. It was asserted that the British Government had neither exercised nor claimed any such right as that which was indicated, nor had they *seized* neutral and non-contraband goods. He declared that the goods were not seized. Their passage to Lorenzo Marques was

[39] For. Rel., 1900, p. 611; Hay to Choate, May 24, 1900.

merely interrupted, and by this interruption they were detained only to the extent that their being on board the ship which had been arrested made their detention unavoidable. It was further alleged that had the prize court held that the arrest of the ships was not justified they would "*presumably* have awarded damages against the captors of the ships and the damages would *presumably* have been so calculated as to enable the ship to meet the claims of merchants arising out of the unjustified interruption of the voyage."[40] The fact was alleged that the court had not so held and that it appeared that the ships should, therefore, bear the consequences of the arrest and meet the merchants' claims. By the law of the flag under which the ships sailed they could not carry goods destined for the enemy. If they shipped such goods they should bear the consequences. Among those consequences was the delaying of the goods until such time as they could be placed on a ship that could legally carry them on to their original port of destination.

The result of such a decision is apparent. The American goods, in the words of Mr. Hay, were "as inaccessible to their owners as if they had been landed on a rock in mid-ocean," since no steamers not belonging to British lines plied between the ports of Cape Colony and Delagoa Bay. But there seemed little chance of securing a revision of Great Britain's decision, which was based upon the principle that she might deal with English subjects and with English ships in accordance with the law of the flag under which those ships sailed. Mr. Hay, therefore, only endeavored to secure every possible guarantee for American interests involved, but incidentally emphasized the view that, although England might use her own as she saw fit she must show just ground for all injuries suffered by innocent American shippers. Instructions were sent to Mr. Hollis, the United States consul at Lorenzo Marques, that he should investigate the seizures and make every effort to protect the property of American citizens, and later he was urged to ascer-

[40] For. Rel., 1900, p. 618; Salisbury to Choate, July 20, 1900.

tain the facts concerning the detention of American flour on board the ships arrested by Great Britain.[41]

It soon developed that freight had been prepaid and that the drafts drawn against the various shipments from New York would be protested for non-payment by the parties on whom they had been drawn at Delagoa Bay.[42] Consequently the title to the property in such cases was vested in the American shippers, and they urged their Government to see that their interests were protected against what they considered an undue extension of belligerent rights against ordinary neutral trade from one neutral port to another. Mr. Hay pointed out the obvious injustice of the goods being in the prize courts with the vessel, even granting that the ship as a common carrier of international commerce had violated the law of its flag, on the remote possibility of having carried for the enemy. He insisted that, although the shippers might be required to furnish invoices and bills of lading, they should not be sent to the prize court for their property. Lord Salisbury, however, contended that the prize court had complete control of the situation, and that any neutral shippers who were innocent could secure the release of their goods only by applying to the court with the proper evidence of ownership. The injustice of the vigorous enforcement of this rule of prize law was obvious, and the demand was made that the goods should be released by order of the proper British law officer and not be left to the mercy of the prize court.[43] It was urged that since the ships had been seized because of a violation of the municipal law of Great Britain, for trading with the enemy, and since the seizure and detention of the flour and other goods was only incidental to the seizure of the ships, the flour, to which no such offense could be imputed, could not under the circumstances be admitted to be subject to capture because not contraband

[41] For. Rel., 1900, p. 538; Hay to Hollis, Dec. 28, 1899.
[42] For. Rel., 1900, p. 540; Toomey to Hay, Jan. 3, 1900.
[43] For. Rel., 1900, p. 543; Choate to Hay, Jan. 5, 1900.

of war. Upon these grounds prompt restitution to the American owners was demanded.[44]

The view of the Department was that nothing seemed to justify the seizure of the American goods, for to all intents and purposes they were *seized* although it was considered by Great Britain that they had merely been *detained* as an incident of the seizure of the ships on which they were carried. Since the flour was sold delivered at Delagoa Bay it was therefore the property of the United States shippers until the obligation of delivery was fulfilled irrespective of the drafts made against it on Delagoa Bay. Upon the return of these drafts unpaid the flour was left in a critical position even if released.[45]

It was clearly shown that the flour had been sold in the regular course of business as for a number of years past, shipments being made of so many bags each month to their regular users who anticipated their ordinary requirements. The consignees, it was urged by the American shippers, were reputable merchants in Delagoa Bay, and the consignments were not of an unusual character but were a part of the ordinary commerce with the East coast.[46] It was admitted that certain of the consignments had been to residents of Johannesburg, but it was at the same time asserted that the consignees were legitimate flour merchants who were not contractors for the Transvaal Government at the time the purchases were made.[47]

The Pennsylvania Milling and Export Company suggested that possibly their shipments had been confused with those of an English firm, Collier and Sons, of Bristol. It was alleged to be a notorious fact that this firm had made large shipments of flour to the Transvaal Government; that Arthur May and Company were the agents of the firm in the Republic, and that the Bristol firm had shipped on the same steamers on which American goods were carried.

[44] For. Rel., 1900, p. 543; Choate to Salisbury, Jan. 4, 1900.
[45] For. Rel., 1900, p. 548; Toomey to Hay, Jan. 10, 1900.
[46] For. Rel., 1900, p. 567; Choate to Salisbury, Jan. 15, 1900.
[47] For. Rel., 1890, p. 584. Affidavit of A. J. Toomey, President of the Penn. Milling and Export Co., Jan. 23, 1900.

A. J. Toomey, President of the Pennsylvania firm, in alleging these facts pointed out that he mentioned only what was well known in shipping circles and did so merely to establish the fact that there had been no wrong intent with reference to his shipments. He urged that the question of the justice of indemnification should be settled, leaving the respective rights of consignors or consignees to the proceeds to be settled afterward.[48]

Mr. Choate, in carrying out instructions received from Washington, insisted that where the ship was seized and taken into port on the charge of trading with the enemy, and where the flour was not held as contraband, and was not claimed to be contraband, and under the circumstances could not be involved in the specific charge against the ship, it was manifestly a great hardship for the owners of the flour to be compelled to go into the prize court at a port short of the original destination even for the purpose of proving their ownership, which he insisted would involve costs and damages for the detention and possible deterioration in value.[49] It was intimated that aside from the pecuniary features of the situation it was of primary importance to insist upon the principles involved, with a view to preventing an extension of belligerent rights to the detriment of all neutral commerce in time of war. Emphasis was therefore placed upon the point that evidence must be shown that the goods were really for the supply of the enemy's forces and that this was in fact their destination at the time of their seizure. The fact was pointed out that otherwise the action of the British authorities seemed to imply the right to exercise an embargo on the sale and delivery of non-contraband goods in the ordinary course of trade with the people of the Republics. It was intimated that this was inconsistent with the view of contraband expressed by the English Government, and wholly inadmissible from the point of view of the United States.[50]

[48] For. Rel., 1900, p. 589; Toomey to Hay, Feb. 12, 1900.
[49] For. Rel., 1900, p. 566; Choate to Salisbury, Jan. 13, 1900.
[50] For. Rel., 1900, p. 578; Choate to Salisbury, Jan. 29, 1900.

The argument was presented that the British Government had seized flour shipped to buyers at Delagoa Bay and had prevented it from reaching that point in time to meet a good market. Consequently, in view of the fact that it was not sold for any purposes hostile to Great Britain, it was urged that the latter should not be allowed to consider herself relieved of any responsibility for indemnity or direct loss assumed by the shippers, or for any indirect loss for which the shippers might have to compensate the buyers on account of the diversion and detention. It was the opinion of the United States that the mere release of the flour to qualified owners did not meet the obligation in the case because the owners could not possibly take the delivery of the flour owing to the obstacles of war at the points where the goods lay. Even if they could do so they would naturally suffer considerable loss by the condition of the market and by any diminution in value that might have occurred to the flour through climatic deterioration.

The American State Department, therefore, suggested as the only equitable plan apparent under the circumstances that Great Britain buy the flour and other innocent goods at their invoice price and pay over the proceeds of the purchases to those persons who could prove a just claim for its value. An additional sum was also asked as "reasonable compensation" for loss of market and other losses that might have been suffered by American interests.[51] In other words, the English Government should use the flour, pay the costs and indemnify the owners reasonably, since the latter were entirely innocent and had depended upon the usual rights and immunities of neutral shippers in time of war. The fact was pointed out that the situation was causing an uncertainty and hesitancy in business circles which was detrimental to all American interests. Although a number of the consignments were being delivered at Delagoa Bay, presumably by English ships, it was alleged that the seizures and the unforeseen attitude of Great Britain had

[51] For. Rel., 1900, p. 582; Toomey to Hay, Jan. 23, 1900.

compelled all later shipments to go by way of Hamburg or Bordeaux when seeking the ports of South Africa in the way of ordinary neutral commerce in order to avoid using British bottoms as a means of transportation. Many of the drafts had been returned unpaid and others were expected in due course, and whether paid or not they would finally have to be lifted by the shippers from the United States, since they were the final recourse.[52] All delay tended to reduce the value of the goods, which were perishable, on account of the climate and because of Cape Colony duties and loss of market.

The offer was made by several of the American shippers to sell to Great Britain for the value of the goods at the port of original destination at the time they would have arrived there had the voyage not been interrupted. And the American representative urged that it would be advisable for all American shippers who were interested to agree to sell upon the same terms with a view to securing an arrangement which would include all neutral American property. He suggested that where the title to property was doubtful both shipper and buyer might unite in the sale, since this course was preferable to incurring questions as between consignors and consignees in the prize courts.[53]

The English Government had naturally been unwilling to buy at current prices for the reason that prices were doubled at Delagoa Bay after the seizures, but it was considered that the price there on the day of the seizures was not unreasonable. Great Britain was willing to buy, but emphasized the point that the alleged owners must prove their title to ownership beyond a doubt as an essential condition of the arrangement, since the Government could not incur the risk of paying one man only to have another appear later and prove that he was the real owner. Fears were expressed that the question of ownership would cause trouble, although the regular shipping documents by which

[52] For. Rel., 1900, p. 540: Hay to Choate, Jan. 10, 1900.
[53] For. Rel., 1900, p. 551; Choate to Hay, Jan. 12, 1900.

the goods had gotten into the ships, it was thought, should be sufficient proof provided the joint consent of consignors and consignees could be secured.[54]

The English view had been that the whole cargo was included in the libel for trading with the enemy declared against the ship, but the plea of the American owners was heard, that the rules of prize procedure should not be so rigorously enforced in the present instances, since such an interpretation would have led to obvious injustice by requiring innocent American owners to appear before the court to prove the title to their property.[55] Such a requirement, it was realized, would have led to difficulties of an almost unsurmountable character under the circumstances. Claimants would have had to submit evidence showing a *bona fide* American citizenship and an actual title to the ownership of the goods at the time they were seized. Within the rules of prize jurisdiction the consignee on whose account and at whose expense the goods were shipped is considered the owner of such goods during the voyage. And as a corollary the further rule is suggested that the right to claim damages caused for an illegal seizure would be in the owner. In the prize court the delay caused by all such questions as between consignor and consignee would have been almost endless.

The question might naturally have arisen whether there could be any basis for a claim for indirect loss sustained by an American shipper growing out of the sale on credit to citizens of the Transvaal. It might be a question, too, whether the consignor might, notwithstanding the seizures, be able to recover at law the full contract price of the goods shipped prepaid to the consignee, and if so, whether the seizure could be considered legally as a wrong against the American consignor. And even granting that the latter were unable to recover at law from the consignee, the question would still remain whether under all the circumstances such inability on the part of the American consignor could

[54] For. Rel., 1900, pp. 553, 554, 579.
[55] For. Rel., 1900, p. 579; Choate to Hay, Feb. 2, 1900.

be legally imputable to the act of the British Government in making the seizure. The question might also have arisen where an agent had bought for the Transvaal Government on credit, so that the title passed when the goods went on board and the goods were discovered to have been contraband, whether an American shipper might not appear to have been privy to the real character of the purchases. In such a case the United States Government could hardly have championed the cause of a party who had shipped contraband. A prize court is filled with pitfalls of the kind, but the diplomacy of Secretary Hay, backed by the prestige of the United States and a reciprocal feeling of friendship between the two nations, was able to avoid all such questions by inducing Great Britain to agree upon a settlement without compelling the claimants to go into the prize court. Although it was pretty well ascertained that no actual contraband in the usual sense of the term had been carried from America by the ships which were seized, difficult questions were thus avoided as between liens and general ownerships which might have arisen had American shippers been compelled to go into court.

It is not a universal rule where the shipper has not been paid for his goods that the property is still in him, so as to constitute him the owner in a prize court, or for the purposes of sale. By the terms of sale and shipment he may not have retained a lien on the goods. But in any case as a rule the title of the absolute owner prevails in a prize court over the interests of a lien holder, whatever the equities between consignor and consignee may be.[56] Consequently the policy adopted by Secretary Hay in demanding that Great Britain should settle with all American shippers on an equitable basis without forcing them to take their chances in a prize court was the wisest course that could have been pursued.

In the final arrangement Great Britain admitted that the American goods had not been liable to seizure except as a

[56] The *Winnifred*, Blatch. Prize Cases, 2, cited 2 Halleck, International Law, Engl. Ed. (1893), 392.

result of the libel attaching to the ships. But any claims for damages due to the owners of the cargoes on account of the failure of the vessels to deliver at the port mentioned in the freight contract, it was asserted, should be made against those who entered into or became responsible for the execution of the contract for the delivery which they failed to perform, and the assumption that such damages could be sustained at law would depend on the terms of the contract of carriage. The English Government, however, did not admit that it was in any way liable for damages to the owners of the flour and other goods, since their detention was due entirely to the circumstance that the ships were not able to complete their voyages, and the fact that they could not complete their voyages was due to the circumstance that such voyages were illegal by the law of the flag under which they were sailing.[57]

Although the financial settlement which Great Britain was willing to make was accepted by the United States, this acceptance did not imply an acquiescence in the view expressed by the English Government with reference to the conditions under which flour and other foodstuffs might become contraband of war, nor in the doctrine of continuous voyages as applied by Great Britain to trading with the enemy. It was preferred at Washington to follow the usual rule and avoid passing upon hypothetical cases until occasion had called them into actual existence. The problem which had been before the Department of State was, not to force Great Britain to declare herself finally upon broad questions of international law, nor to express the final attitude of the United States upon questions which were not immediately at issue, but to meet the demands of American shippers and secure their immediate interests by some equitable agreement with Great Britain. The arrangement agreed upon, therefore, met only the necessity of the case immediately in view. The United States Consul-General at Cape Town was to arrange with Sir Alfred Milner,

[57] For. Rel., 1900, pp. 604–605; Salisbury to Choate, March 3, 1900.

the British High Commissioner in South Africa, for the release or purchase by the British Government of any goods owned by citizens of the United States, which, if purchased, were to be paid for at the price they would have brought at the port of destination at the time they would have arrived there had the voyage not been interrupted.

Against certain articles, especially the oil consigned to the Netherlands South African Railway, an allegation of enemy's property was justly made and the oil confiscated.

In the end most of the American claims were withdrawn or paid in full. In the former event the American owners threw the burden of proof of ownership upon the consignees, who were instructed to present their claims through their respective governments. But it should be noted that in acceding to the American demands by purchasing the goods, the British Government emphasized the fact that the act was purely *ex gratia* on the part of England. The British representative clearly stated that the goods had been legally detained and that it was open for the owners to come and take them upon proof of ownership before the prize court. It was pointed out that the fact that none but British ships ran between Cape Colony and Delagoa Bay, although an unfortunate circumstance, was one which could hardly be held to be a fault of the English Government. The enforcement of the English law was the right of Great Britain no matter upon whom the inconvenience might happen to fall. Lord Salisbury said: "It must be distinctly understood that these payments are made purely *ex gratia* and having regard to the special circumstances of this particular case. No liability is admitted by Her Majesty's Government either to purchase the goods or to compensate . . . for the losses or for the expenses . . . incurred."[58] The view held by the English statesman was that Great Britain's concession in these cases should not serve as a precedent in the future.

The attitude which Great Britain had assumed with reference to the different seizures was generally considered

[58] For. Rel., 1900, p. 618; Salisbury to Choate, July 20, 1900, with reference to the *Beatrice*.

a menace to neutral commercial interests should the British position be accepted as a precedent for similar cases that might occur. The danger of such a precedent had been realized by Secretary Hay and throughout the negotiations he had dwelt upon the fact that while the protection of American interests was the end immediately sought, the principles which underlay the disposition of the particular cases were of the greater importance.

Lord Roseberry, too, called attention to the danger of the precedent should England determine to treat foodstuffs in general as contraband of war. It was pointed out, however, that in the seizures of foodstuffs near Delagoa Bay the question of contraband did not necessarily arise, since all trade with the enemy, even in articles the most innocent, was forbidden under heavy penalty. The seizure of certain classes of foodstuffs as of a contraband character did not of necessity involve the principle of treating all foodstuffs as contraband of war. The English view was that it had long been recognized that a belligerent might discriminate between foodstuffs obviously intended for the commissariat of an army in the field and foodstuffs which might be properly imported for the use of the non-combatant population.

The consensus of opinion, however, seems to be that while there may be reasonable ground for including tinned or canned meats and the like in the former category, flour naturally belongs to the latter class, and it has been pointed out that neither the British Government nor any other has the power of treating what it pleases as contraband without reference to the prize court, with which alone the decision rests. The prize courts of all countries have held at different times that foodstuffs under certain circumstances are contraband, as, for instance, where they are intended for the supply of a belligerent garrison as well as in less obvious cases, but any decision which considered foodstuffs generally as contraband would be disquieting to all neutral interests.

One writer has asserted that such an innovation would not be alarming to Great Britain as long as she remained predominant at sea, since the more effectual her sea power were declared to be in preventing sustenance from going over sea to her enemy the better it would be for English predominance. It is believed by this writer that during the existence of this supremacy at sea she would be able to protect the passage of general foodstuffs from foreign countries to her own ports. He concludes, however: "Of course if we lose our predominance at sea it is another matter. But then, è finita la Musica."[59]

The acceptance of the principle that foodstuffs are contraband of war, it need hardly be said, is not even a remote probability except under very exceptional circumstances where they are for the immediate supply of the enemy's army or navy, and in most cases of this kind they can usually be confiscated as enemy's property without a direct implication of a distinctly contraband character. In other words, the use for which they are intended may give reasonable ground for the conclusive presumption that they are for the enemy's immediate supply, whether the title to property in them vests in the enemy or in some other agency, and the last question is always to be decided by the prize court of the particular country which has made the seizure. The decision should be based upon a careful examination of the evidence which is submitted to the court, and not presumed from the fact that the political power has exercised the belligerent right of visit, search and detention. The final decision of confiscation rests with the prize court.

By way of recapitulation it may be pointed out that the goods seized or detained by the English authorities in South African waters were shipped by American merchants and manufacturers, many of them on regular monthly orders to alleged reputable merchants in Lorenzo Marques, Delagoa Bay, in Portuguese territory. Certain consignments were intended for alleged reputable firms in Johannesburg, South

[59] Thos. Gibson Bowles, Jan. 4, 1900. For. Rel., 1900, p. 546.

African Republic. The articles composing the cargoes of the ships were of the general character of foodstuffs, chiefly flour, canned meats, and other food materials. Lumber, hardware and various miscellaneous articles generally considered innocent in character were also included. There was a consignment of lubricating oil to the Netherlands South African Railway, the latter company held to be the property of the Transvaal Government, and a like consignment to the Lorenzo Marques Railway, a Portuguese concern. At first the seizures which occurred at points between Cape Colony and Delagoa Bay were supposed to have been made on account of contraband. Later Great Britain declared that the ships had been seized because of the violation of a municipal ordinance forbidding British subjects to trade with the enemy. The *Mashona, Beatrice* and *Sabine* were British ships sailing under the English flag. The *Maria* was a Dutch vessel sailing under the flag of Holland, but was supposed by the English authorities to have been under charter to an English firm. In the latter case the ship would have been liable to the English law, but for the mistake the owners of the ship as well as the owners of the cargo were indemnified by the English Government. The seizure of the cargoes of the British ships was declared to have been merely an unavoidable incident of the seizure of the alleged guilty ships. Compensation was made to American shippers by the purchase of the goods. The consignment of oil to the Netherlands South African Railway was confiscated as enemy's property.

The views of Great Britain and the United States were divergent with reference to the principle of treating foodstuffs as contraband. Rather as an *obiter dictum* the former declared: "Foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of the seizure." [60]

[60] For. Rel., 1900, p. 555.

The United States declared that the validity of the right to seize goods on the ground of contraband could not be recognized "under any belligerent right of capture of provisions and other goods shipped by American citizens in the ordinary course of trade to a neutral port." [61]

England declared: "Her Majesty's Government have not admitted liability in respect of any claims for loss or damage sustained . . . in consequence of the delay in the delivery of the . . . goods. But they have offered to purchase the flour on board by United States citizens. Claims for redress for the non-delivery of the cargo appear to be a matter for settlement between such claimants and the ship which undertook to deliver. British subjects who owned goods on board, having no right to trade with the enemy, are not in the same position as foreign owners. The latter are not guilty of any offense in trading with the enemy from a neutral country unless the goods are contraband and are found on board a British ship in British territorial waters or on the high seas, *and are destined for the enemy's countries.*" [62]

With reference to trading with the enemy Great Britain attempted to extend the accepted doctrine of continuous voyages. She expressed herself as follows: "An ultimate destination to citizens of the Transvaal even of goods consigned to British ports on the way thither, might, if viewed as one "continuous voyage" be held to constitute in a British vessel such a "trading with the enemy" as to bring the vessel within the provisions of the municipal law." [63]

The United States held that "the destination of the vessel being only such [British] ports . . . the port authorities may presumably, and are assumed to be bound to, prevent transshipment through British territory of contraband destined for the Boers." [64]

[61] For. Rel., 1900, p. 540.
[62] Mr. Broderick, Under-Secretary for Foreign Affairs, speaking in House of Commons in regard to the *Mashona* on March 19, 1900.
[63] For. Rel., 1900, p. 609.
[64] For. Rel., 1900, p. 594.

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[63] For. Rel., 1900, p. 609.
[64] For. Rel., 1900, p. 594.

No contraband was shown, and the attempt which Great Britain made to extend the ruling of the Supreme Court of the United States in 1863 so as to apply to trading with the enemy cannot be considered to have been successful. The questions of international law involved in the seizures of flour and foodstuffs generally were not answered by the final arrangement between the Governments concerned. In his Message to Congress in 1900 President McKinley deplored the fact that while the war had introduced important questions the result had not been a "broad settlement of the question of a neutral's right to send goods not contraband *per se* to a neutral port adjacent to a belligerent area."

Two things, however, were apparently admitted: (1) that a belligerent may declare flour contraband *pro hac vice;* (2) that a belligerent may detain neutral goods and divert them from their destination on a reasonable suspicion that they are intended for the enemy, subject to a claim for compensation including damage by detention.

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